

Form No. (J2)

ORDER SHEET
IN THE HIGH COURT AT CALCUTTA
Civil Appellate Jurisdiction
ORIGINAL SIDE

Present :

The Hon'ble JUSTICE T. S. SIVAGNANAM

And

The Hon'ble JUSTICE HIRANMAY BHATTACHARYYA

ITAT/38/2020
PRINCIPAL COMMISSIONER OF INCOME TAX-3, KOLKATA
VS
M/S. EIH LTD.

Appearance:
Mr. S.N. Dutta,
Mr. Soumen Bhattacharjee, Advs.
...for the appellant.

Mr. J.P. Khaitan, Sr. Adv.,
Mr. Soham Sen, Adv.,
for the respondent.

Heard on : 17.01.2022

Judgment on : 17.01.2022

T.S. SIVAGNANAM J. : This appeal of the revenue filed under Section 260A of the Income Tax Act (the 'Act' in brevity) is directed against the composite order dated 5th April, 2017 passed by the Income Tax Appellate Tribunal, A-Bench, Kolkata (the

'Tribunal') in ITA No.191/Kol/2013 and ITA No.352/Kol/2013 for the assessment year 2009-10.

The revenue has raised the following substantial questions of law for consideration:

"i) Whether on the facts and in the circumstances of the case, the Learned Tribunal erred in law in deleting the disallowance of Rs.1,31,54,252 being 10% of the expenditure incurred on running, repairs and maintenance and depreciation claimed on two aircrafts without considering that the aircrafts were also used for personal purposes of the directors.

ii) Whether on the facts and in the circumstances of the case, the Learned Tribunal erred in law in deleting the disallowance under section 40(a)(ia) of Rs.11,32,19,470 paid as commission and sitting fees to directors of the company without deducting tax at source under section 194J of Income Tax Act.

iii) Whether on the facts and in the circumstances of the case, the Learned Tribunal erred in law in deciding the appeal in favour of the assessee whereas the assessee had claimed this amount of Rs.69,50,200/- as deduction on account of write off out of the amounts advanced towards acquisition of equity shares in a joint venture which is capital in nature and not revenue in nature.

iv) Whether on the facts and in the circumstances of the case, the Learned Tribunal erred in law allowing the appeal of the assessee by considering the principle payment of lease rental of Rs.3,83,59,225/- as a allowable expense when the assessee is a lessee in a financial lease agreement with the lessor and all the risk and responsibility have to be transferred to the assessee.

v) Whether on the facts and in the circumstances of the case, the Learned Tribunal erred in law in holding that in a financial lease when substantial risk and responsibility have been transferred to the assessee the ownership also get transferred and the payment of lease rental by the lessee to the lessor is a capital expenditure rather than revenue expenditure.

vi) Whether on the facts and in the circumstances of the case, the Learned Tribunal erred in law in deleting the disallowance Rs.4,09,85,275/-, Rs.12,14,760/- and Rs.1,48,225/- under section 40(a)(i) on account of advertisement consultancy fees and advertisement to five parties in Sweden respectively by ignoring the fact that such expenses are subject to tax in India as FTS under section 9(1)(vii) of the Act.

vii) Whether on the facts and in the circumstances of the case, the Learned Tribunal erred in law in deleting the

disallowance of Rs.11,72,056/- under section 40(a)(i) on account of inspection fees by ignoring the fact that such expenses are subject to tax in India under explanation to section 9(1)(vii) of the Act.

We have heard Mr. S.N. Dutta, learned standing counsel assisted by Mr. Soumen Bhattacharjee, learned Counsel appearing for the appellant/revenue and Mr. J.P. Khaitan, learned Senior Counsel, assisted by Mr. Soham Sen, learned Counsel appearing for the respondent/assessee.

We need not labour much to decide some of the substantial questions of law in view of the decision rendered in the assessee's own case by this Court for the assessment year 2008-09 in ITAT No.34 of 2020 dated 16th December, 2021. It is not disputed by the revenue that the said decision which was decided against the revenue would squarely cover the substantial questions of law no.(i), (ii), (vi) and (vii) as suggested before us in this appeal. Thus, following the decision in ITAT No.34 of 2020 dated 16th December, 2021 the substantial questions of law no.(i), (ii), (vi) and (vii) are answered against the appellant/revenue.

So far as the substantial question of law no.(iii) is concerned, similar question was raised by the revenue in ITAT No.53 of 2017 for the assessment year 2006-07 which was dismissed and the said substantial question of law was answered against the

revenue. Thus, following the said decision, the substantial question of law no.(iii) is answered against the revenue.

So far as the substantial questions of law no.(iv) and (v) are concerned, the same pertain to addition on account of principal repayment of lease rental under financial lease. The assessing officer held that the principal repayment of lease rental is nothing but payment of cost of purchase in instalment and has to be treated as capital expenditure and added the said amount to the income of the assessee. The assessee preferred an appeal to the Commissioner of Income Tax (Appeals) [CIT(A)] who held that the lease agreement in a financial lease as it had been treated as such in the books following the Accounting Standards - 19 and upheld the finding of the assessing officer. The assessee made an alternate submission stating that if it is not held to be operating lease, depreciation has to be granted. This alternate submission was accepted by the [CIT(A)] and to that extent relief was granted to the assessee. The assessee was in appeal before the Tribunal. The Tribunal took note of the fact that in assessee's case for the assessment year 2011-12 relief was granted and also the order passed by the Tribunal for the assessment year 2008-09. Though it may be true that an appeal has been preferred by the revenue for the assessment year 2008-09, we note that the relief granted to the assessee for the assessment year 2011-12 by the Dispute Resolution Panel (DRP) has remained unassailed. Therefore,

we are inclined to confirm the finding of the Tribunal which in our opinion is not contrary to facts. However, since the said question has been admitted in ITAT No.121 of 2017 while affirming the finding of the Tribunal in so far as the substantial questions no.(iv) and (v), we leave the substantial questions of law open. In the result, the substantial questions of law no.(i), (ii), (vi) and (vii) are answered against the revenue following the decision of this Court in ITAT No.34 of 2020 dated 16th December, 2021 for the assessment year 2008-09.

The substantial question of law no.(iii) is decided against the revenue following the decision of this Court in ITAT No.53 of 2017 dated 23rd July, 2018 in the assessee's own case for the assessment year 2006-07. The substantial questions of law no.(iv) and (v) are left open. However, the finding recorded by the Tribunal and the relief granted to assessee stands confirmed.

In the light of the above, the appeal (ITAT 38/2020) fails and is hereby dismissed.

(T. S. SIVAGNANAM, J.)

I agree.

(HIRANMAY BHATTACHARYYA, J.)