

IN THE HIGH COURT OF ORISSA AT CUTTACK

ITA No.50 of 2006

GKW Ltd.

....

Appellant

Mr. Jagabandhu Sahoo, Senior Advocate along with
Mr. Ronit Ghosh, Advocate

-versus-

***Commissioner of Income Tax,
Bhubaneswar***

....

Respondent

Mr. T.K. Satapathy, Senior Standing Counsel

CORAM:

THE CHIEF JUSTICE

JUSTICE CHITTARANJAN DASH

ORDER

16.08.2022

Order No.

04.

1. This is an appeal by the Assessee against an order dated 17th August 2005 passed by the Income Tax Appellate Tribunal, Cuttack Bench, Cuttack (Tribunal) in Income Tax Appeal for the assessment year (AY) 1991-92.

2. While admitting the present appeal on 5th November 2012, the following questions were framed for consideration by this Court:

“(a) Whether and in any event, the Assessee is entitled to deduction under Section 57 (iii) of the Act in respect of the interest expenditure and public issue expenses incurred in respect of the funds which gave rise to interest income assessable under Section 56?

(b) Whether the Tribunal was justified in law in upholding the taxation of interest received amounting to Rs.1,02,02,714/- for the assessment year 1991-92?

(c) Whether on a true and proper interpretation of Section 35AB of the Act, commencement of manufacture is a condition for allowance of the deduction and the tribunal was justified in law in holding that deduction under the said section was not allowable since manufacture had not commenced even though the Assessee had commenced its business?”

3. As far as Question (b) is concerned, the interest earned on the deposits was at a time when commercial production had not yet commenced. Admittedly, the interest was from short term deposits made by the Assessee out of the borrowed capital.

4. The question is no longer *res integra*. A similar question has in fact been answered in favour of the Assessee by this Court by its judgment dated 17th November 2011 in *M/s. Neelachal Ispat Nigam Limited v. Assistant Commissioner of Income Tax, Circle-2(1), Bhubaneswar* (ITA No.8 of 2005). In the said decision, after considering the judgments in *Tuticorin Alkali Chemicals & Fertilizers Ltd., Madras v. Commissioner of Income Tax, Madras* (1997) 6 SCC 117; *Commissioner of Income Tax, Bihar II, Patna v. Bokaro Steel Ltd.* [1999] 151 CTR (SC) 276 and *Commissioner of Income Tax v. Karnal Co-operative Sugar Mills Ltd.* (2000) 243 ITR 2 (SC), this Court held that interest earned on short term deposits from the borrowed capital would be capital and not revenue in nature. Consequently, Question (b) is answered in the negative in favour of the Assessee and against the Department.

5. As far as Question (c) is concerned, reliance is placed by learned counsel for the Assessee on the judgment of the Madhya Pradesh

High Court in ***Commissioner of Income Tax v. Bright Automotives and Plastics Ltd.*** [2005] 273 ITR 60.

6. In the present case, the deduction is sought of 1/6th of the expenditure on acquiring the know-how. It has been disallowed only because in the previous year in question, the manufacturing activity of the Assessee had not commenced. As explained by the Madhya Pradesh High Court in the aforementioned decision, this is not one of the conditions on which the deduction is allowable. As long as the technical know-how is acquired and payment therefor is made in the same previous year, then irrespective of whether manufacturing commenced during the said previous year, the 1/6th amount would be eligible to be claimed as deduction. It has been explained thus in para 18 of the judgment of the Madhya Pradesh High Court in ***Commissioner of Income Tax v. Bright Automotives and Plastics Ltd.*** (*supra*):

“18. In our opinion, the use of the expression “acquiring” in section 35AB has to be given a liberal meaning rather than a strict one. In other words, in order to attract the rigour of section 35AB it may not be necessary for the assessee to actually become an absolute owner of the know-how. But if on payment of money consideration an assessee is able to use the know-how to run his business then in such event, the requirement of section 35AB stands satisfied. Merely because actual title is not passed in favour of the assessee yet if an assessee is able to use effectively his business with the aid of know-how obtained by him pursuant to an agreement on payment of consideration then in our opinion, it is sufficient to attract the provisions of section 35AB. In our opinion, the use of the expression “acquire” has to be used liberally and in the context of actual user of know-how- be that in a capacity as

conditional/limited owner or absolute owner or as licensee.”

Consequently, Question (c) is answered in the negative i.e. in favour of the Assessee and against the Department.

7. In view of the above decision of this Court holding the interest received on short term deposits from borrowed capital to be capital in nature, the question of treating it as income from other sources does not arise. Therefore, Question (a) need not be answered.

8. Accordingly, the impugned order of the Tribunal and the corresponding orders of the CIT(A) and the Assessing Officer to the above extent are set aside. The appeal is disposed of in the above terms.

9. Issue urgent certified copy of this order as per rules.

(Dr. S. Muralidhar)
Chief Justice

(Chittaranjan Dash)
Judge

S.K. Guin