

ORDER

OD – 3 & 4

IN THE HIGH COURT AT CALCUTTA
SPECIAL JURISDICTION (INCOME TAX)
ORIGINAL SIDE

ITA/1/2018
PRINCIPAL COMMISSIONER OF INCOME TAX – 2, KOLKATA
VERSUS
WEST BENGAL INFRASTRUCTURE DEVELOPMENT FINANCE CORPORATION
LIMITED

ITA/331/2008
COMMISSIONER OF INCOME TAX, KOLKATA – II
VERSUS
WEST BENGAL INFRASTRUCTURE DEVELOPMENT FINANCE CORPORATION
LIMITED

BEFORE :

THE HON'BLE JUSTICE SURYA PRAKASH KESARWANI
AND
THE HON'BLE JUSTICE RAJARSHI BHARADWAJ

Date : 1st May 2024.

Appearance:

Ms. Smita Das De, Advocate
... for the appellant.

Mr. J. P. Khaitan, Senior Advocate
Mr. Ananda Sen, Advocate
... for the respondent.

1. Heard Smt. Smita Das De, learned senior standing counsel for the appellant and Sri J. P. Khaitan, learned senior advocate assisted by Sri Ananda Sen, learned counsel for the respondent assessee.
2. ITA/1/2018 relates to assessment year 2001-02. ITA/331/2008 relates to assessment year 2002-03. ITA/1/2018 was admitted by this Court by order dated 17th January 2018 on three substantial questions of law.

ITA/331/2008 was admitted by this Court by order dated 01.03.2011 on two substantial questions of law. Both the substantial questions of law as framed in ITA/331/2008 are similar to the substantial questions of law Nos.2 and 3 as framed in ITA/1/2018. The substantial questions of law as framed in ITA/1/2018 as framed by this Court are reproduced below:-

- “1. *Whether in the facts and in the circumstances of the case, direction of the Income Tax Appellate Tribunal allowing an amount of Rs.1,40,77,397/- under Section 43B(d) of the Income Tax Act, 1961 was perverse, in the absence of such amount not having been debited to the profit and loss account and not having been claimed by the assessee in their return or revised return?*
 2. *Whether the Income Tax Appellate Tribunal, in directing deletion of addition by the Assessing Officer of a sum of Rs.1,24,31,423/- as interest from non-performing assets, had properly construed the provision of Section 43D of the Act, the said sum representing interest on non-performing assets which were not accounted for by the assessee?*
 3. *Whether Income Tax Appellate Tribunal erred in directing deletion of interest of recurring deposit of Rs.11,74,79,000/- which was added by the Assessing Officer in a situation where the assessee represented that the interest accrued in the year of maturity and not during the subsistence of the deposit tenure?”*
3. The substantial question of law in ITA/331/2008 are reproduced below:-
- “1) *Whether the learned Tribunal below committed substantial error of law in deleting the addition of Rs.41,89,29,498/- on account of interest on NPA without considering that non-recognition of*

income is not permissible under the Income-tax Act, 1961 and the same should be added to the total income of the assessee for the year.

2) *Whether the learned Tribunal below committed substantial error of law in deleting the addition of Rs.36,09 crores being interest on sinking fund without considering that the assessee followed the mercantile system of accounting and the assessee itself in its return for the Assessment Year 2004-05 has credited and included interest earned on accrual basis on its deposit.”*

4. Since both the appeals involve common substantial questions of law with one additional question in ITA/1/2018, therefore, both the appeals have been heard together, with the consent of learned counsel for the parties.
5. We have substantially heard learned counsel for the parties, carefully considered their submissions and perused the paper book.

Re: Substantial question of law No.1 in ITA/1/2018

6. Briefly stated, facts of the present case are that the respondent assessee is an undertaking of the Government of West Bengal and is registered as a non-banking financial company [for short, ‘NBFC’]. It is engaged in the business of financing various industries and infrastructure projects in West Bengal. Its accounts are being audited. During the assessment year 2001-02, the assessee paid on 18.09.2000 and 18.11.2000 EMI to ICICI Bank in respect of term loan taken by it. The interest component in the payment of EMI so made was a sum of Rs.1,40,77,397/-. Due to inadvertence, the assessee showed the entire payment of EMI with interest

as repayment of principal. When the mistake was noticed, it was rectified in the following financial year. The mistake was detected after the assessment order was passed by the assessing officer. Therefore, in appeal before the CIT(A), the assessee took additional ground that the interest of Rs.1,40,77,397/- was an allowable business expenditure. The CIT(A) rejected the claim of the assessee. Aggrieved, the assessee filed an appeal before the Income Tax Appellate Tribunal, Bench "A", Kolkata which allowed the claim of the assessee on the aforesaid point. Aggrieved with the order of the ITAT dated 16.10.2015 in ITA No.388/Kol/2008 and cross appeal in ITA/464/Kol/2008 [assessment year 2001-02], the revenue has filed the present appeal in ITA No.1/2018.

7. The ITAT has considered the aforesaid issue in detail and recorded its finding in paragraph 9 of the impugned order, as under:-

*"9. We have given a very careful consideration of the rival submissions. From a perusal of the remand report of the AO, a copy of which is placed at page 39 of the paper book filed by the assessee, it is clear that the AO does not dispute the fact that an amount of Rs.1,40,77,397/- was interest on term loan which was paid to ICICI during the previous year relevant to A.Y. 2001-02. It is also not in dispute that the provision of section 43B of the Act will apply to such interest payment and therefore the interest expenditure in question cannot be claimed by the assessee as deduction in any other assessment year in view of the specific bar contained in section 43B(d) of the Act. In other words irrespective of the method of accounting following by the assessee, **interest,***

expenses of the nature referred to section 43B(d) of the Act can be allowed as a deduction only in the year in which such interest are actually paid. The debit to the profit and loss account of an amount which is claimed as deduction u/s 43B of the Act is not a requirement and the decision of the Hon'ble Calcutta High Court in the case of Associated Pigments Ltd. Vs CIT (supra) supports the plea of the assessee in this regard. The only objection which remains for consideration is as to whether in the absence of a revised return of income filed by the assessee making claim for deduction on account of interest expenses the deduction can be allowed. The reliance placed by the revenue in this regard is on the decision of the Hon'ble Supreme Court in the case of Goetze India Ltd. (supra) wherein it had laid down that the AO cannot consider a claim made by an Assessee before him, in the absence of such claim being made in the return of income or a revised return of income. As rightly contended by the ld. Counsel for the assessee, such a bar does not extend to the appellate authorities under the Act. The decisions referred to by the ld. Counsel for the assessee square support the stand of the assessee in this regard. **We, therefore, hold a sum of Rs.1,40,77,397/- should be allowed as deduction.** We hold and direct accordingly and allow the grounds raised by the assessee in this regard.”

8. We find that the controversy is squarely covered by a judgment of Hon'ble Supreme Court in Wipro Industries Limited v. Commissioner of Income Tax [2022] 443 ITR 250 (SC) in which Hon'ble Supreme Court held as under:-

“10. The learned Additional Solicitor General appearing for the Department had faintly argued that since the appellant in its return

had taken a conscious explicit plea with regard to the part of the claim being ascribable to capital expenditure and partly to revenue expenditure, it was not open for the appellant to plead for the first time before the Income-tax Appellate Tribunal that the entire claim must be treated as revenue expenditure. Further, it was not open to the Income-tax Appellate Tribunal to entertain such fresh claim for the first time. **This submission needs to be stated to be rejected. In the first place, the Income-tax Appellate Tribunal was conscious about the fact that this claim was set up by the appellant for the first time before it, and was clearly inconsistent and contrary to the stand taken in the return filed by the appellant for the concerned assessment year including the notings made by the officials of the appellant. Yet, the Income-tax Appellate Tribunal entertained the claim as permissible, even though for the first time before the Income-tax Appellate Tribunal, in appeal under section 254 of the 1961 Act, by relying on the dictum of this court in National Thermal Power Co. Ltd. Further, the Income-tax Appellate Tribunal has also expressly recorded the no objection given by the representative of the Department, allowing the appellant to set up the fresh claim to treat the amount declared as capital expenditure in the returns (as originally filed), as revenue expenditure. As a result, the objection now taken by the Department cannot be countenanced.**

Learned Additional Solicitor General had placed reliance on the decision of this court in *Goetze (India) Ltd. v. CIT* in support of the objection pressed before us that it is not open to entertain fresh claim before the Income-tax Appellate Tribunal. According to him, the decision in *National Thermal Power Co. Ltd.* merely permits

*raising of a new ground concerning the claim already mentioned in the returns and not an inconsistent or contrary plea or a new claim. **We are not impressed by this argument. For, the observations in the decision in Goetze (India) Ltd. itself make it amply clear that such limitation would apply to the “assessing authority”, but not impinge upon the plenary powers of the Income-tax Appellate Tribunal bestowed under section 254 of the Act. In other words, this decision is of no avail to the Department.”***

9. Thus, the substantial question of law No.1 is answered in negative i.e. in favour of the assessee and against the revenue.

Re: Substantial question of law No.2 in ITA/1/2018 and substantial question of law No.1 in ITA/331/2008

10. This substantial question of law regarding alleged interest on non-performing asses is covered by a judgment of Delhi High Court in Commissioner of Income Tax v. Vasisth Chay Vyapar Ltd. & Another [2011] 330 ITR 440 (Delhi), which was affirmed by Hon'ble Supreme Court in Commissioner of Income-Tax v. Vasisth Chay Vyapar Ltd. [2019] 410 ITR 244 (SC). The relevant portion of the judgment of Delhi High Court in the case of Vasisth Chay Vyapar Ltd. (supra) is reproduced below:-

“In this scenario, we have to examine the strength in the submission of learned counsel for the Revenue that whether it can still be held that income in the form of interest though not received had still accrued to the assessee under the provisions of the Income-tax Act and was, therefore, exigible to tax. Our answer is in the negative and we give the following reasons in support:

(1) First of all we would discuss the matter in the light of the provisions of the Income-tax Act and to examine as to whether in the given circumstances, interest income has accrued to the assessee. It is stated at the cost of repetition that the admitted position is that the assessee had not received any interest on the said ICD placed with Shaw Wallace since the assessment year 1996-97 as it had become NPAs in accordance with the Prudential Norms which was entered in the books of account as well. The assessee has further successfully demonstrated that even in the succeeding assessment years, no interest was received and the position remained the same until the assessment year 2006-07. Reason was adverse financial circumstances and the financial crunch faced by Shaw Wallace. So much so, it was facing winding up petitions which were filed by many creditors. These circumstances led to an uncertainty in so far as recovery of interest was concerned, as a result of the aforesaid precarious financial position of Shaw Wallace. What to talk of interest, even the principal amount itself had become doubtful to recover. In this scenario it was legitimate move to infer that interest income thereupon has not “accrued”. We are in agreement with the submission of Mr. Vohra on this count, supported by various decisions of different High Courts including this court which has already been referred to above.

(2) In the instant case, the assessee-company being NBFC is governed by the provisions of the RBI Act. In such a case, **interest income cannot be said to have accrued to the assessee having regard to the provisions of section 45Q of the RBI Act and Prudential Norms issued by the RBI in exercise of its statutory powers. As per these norms, the ICD had become NPA and on such NPA where the interest was not received**

and possibility of recovery was almost nil, it could not be treated to have been accrued in favour of the assessee.”

Relevant portion of the judgment of Hon'ble Supreme Court in the case of Vasisth Chay Vyapar Ltd. (supra) is also reproduced below:-

*“2. Having gone through the impugned judgment in the aforesaid appeals, we are of the view that the consideration of the question has been given a full and **meaningful reasoning and we agree with the same.**”*

11. Thus, the substantial question of law No.2 relating to assessment year 2001-02 [ITA/1/2018] and the substantial question of law No.1 relating to assessment year 2002-03 [ITA/331/2008] are answered in favour of the assessee and against the revenue.

Re: Substantial question of law No.3 in ITA/1/2018 and substantial question of law No.2 in ITA/331/2008

12. While considering this issue, the ITAT in the impugned order has recorded the following findings:-

*“22. The second ground in respect of interest on **recurring deposit is also covered in favour of the assessee by the aforesaid order in ITA No.395/Kol/2006 order dated 25.08.2006 read with the order dated September 21, 2007 passed on the MA against the aforesaid order.** The material facts are that **the assessee creates sinking fund by depositing from time to time the required amounts with Banks in the form of recurring deposits of varying periods ranging from 3 to 10 years. Interest on such recurring deposits is not payable at the end of previous year but is payable only on***

the maturity of the period for which the respective recurring deposits have been made. Such recurring deposits are made with the sole object of having funds in hand at the time of redemption of infrastructure development bonds issued by the assessee to raise funds for the purpose of pursuing its objects of providing infrastructure finance. **Since both interest and principal are due and payable only upon maturity, the assessee did not account for any interest.** According to the revenue, in case of a recurring deposit, interest is received and reinvested and as such interest is required to be taxed every year and not altogether at the time of maturity.

...

24. We also find that the Hon'ble Kerala High Court in *CIT v Federal Bank Ltd.*, (2008) 301 ITR 188 (Ker) has held that interest in respect of securities became due and receivable only upon maturity and there was no entitlement to interest prior to maturity. **It is also pertinent to mention that the entire interest was accounted for and offered to tax by the assessee in the assessment year 2005-06.** In this connection, attention is invited to Note 6 of the assessee's accounts for the financial year ended March 31, 2005 at page 33 of the Paper Book in ITA No. 1080/K/2009 for the assessment year 2005-06. It was submitted that in the event the grounds relating to **interest on recurring deposit in the revenue's appeals for the assessment years 2001-02, 2003-04 and 2004-05 are adjudicated against the assessee, the AC should be directed to exclude such interest accounted for and offered to tax in the assessment year 2005-06 from the assessment for that year.**

25. On behalf of the revenue, reliance was placed on the judgment of the Hon'ble Supreme Court in *CIT v T.N.K. Govindarajulu Chetty*, (1987) 165 ITR 231 (SC). That case related to interest on land acquisition compensation and it was held that such interest accrued on year to year basis. In the instant case, there was no accrual since the interest was neither due nor receivable until maturity. **The decision of the Hon'ble Supreme Court in *CIT v. A.Gajapathy Naidu*, (1964) 53 ITR 114 (SC) sought to be relied upon on behalf of the revenue actually supports the plea of the assessee in its contention that interest income is taxable only upon maturity when the right to receive interest accrued to the assessee.** In *Laxmipat Singhanian v CIT*, (1969) 72 ITR 291 (SC), relied upon on behalf of the revenue it was held that where the amount had escaped assessment on accrual basis it could not be taxed in another year on the basis of receipt. No such situation has arisen in the instant case inasmuch as **accrual of interest is only upon maturity** and there is no question of any income escaping assessment on accrual basis. On behalf of the revenue, it was also submitted that the three decisions relied upon in connection with non- provision of interest on NPA were also relevant for deciding the ground relating to interest on recurring deposits. We are of the view that none of the said decisions is of any assistance to the revenue since there is no accrual of interest prior to maturity.”

13. The findings of fact as recorded by the ITAT [afore-quoted] have not been disputed by learned counsel for the appellant before us, besides the fact that the accrual of interest on recurring deposit / sinking fund was only upon maturity, it is also an admitted fact of the case that the entire

accrued interest was accounted for by the assessee and was offered to tax in the assessment year 2005-06. Thus, the interest on such deposit/fund which was subjected to tax by the assessing officer in assessment year 2001-02 and assessment year 2002-03 was offered for taxation by the assessee in the assessment year 2005-06 and was accordingly taxed. Under the circumstances, the impugned order of the ITAT cannot be said to suffer from any manifest error of law. The substantial question of law No.3 in ITA/1/2018 and the substantial question of law No.2 in ITA/331/2008 are, therefore, answered in favour of the assessee and against the revenue.

14. For all the reasons afore-quoted, we do not find any merit in both the appeals. Accordingly, both the appeals of the revenue are dismissed. The substantial questions of law have been answered above accordingly.

(SURYA PRAKASH KESARWANI, J.)

(RAJARSHI BHARADWAJ, J.)