



* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ ITA 598/2005

COMMISSIONER OF INCOME TAX
Through

..... Appellant
Ms. P. L. Bansal, Adv.

versus

M/S ESCORTS TRACTORS LTD.
Through

..... Respondent
Mr. R. M. Mehta with
Ms. Simran Mehta, Advs.

CORAM:
HON'BLE MR. JUSTICE MADAN B. LOKUR
HON'BLE MR. JUSTICE VIPIN SANGHI

ORDER
12.09.2006

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The Revenue is aggrieved by an order dated 7th September, 2004 passed by the Income Tax Appellate Tribunal Bench 'C' in ITA No.2731/Del/1999 relevant for the assessment year 1995-96.

Although the impugned order has been passed on several issues, we are concerned with the issue relating to the expenses incurred by the Assessee in respect of the issue of non convertible debentures.

The Assessee had claimed an expenditure of Rs.38,33,681/- incurred in the process of rights issue of non convertible debentures as being incidental to its business and it was claimed that the issue of non convertible debentures did not create any asset or



advantage of an enduring nature in favour of the Assessee.

The Assessing Officer however, took the view that the expenditure incurred was covered by Section 35D (2)(C)(4) of the Income Tax Act, 1961 and therefore it would be amortized over a 10 year period. The Assessing Officer, therefore, did not allow the entire expenditure for deduction in the relevant assessment year. The view of the Assessing Officer was affirmed by the Commissioner of Income Tax (Appeals) but set aside by the Tribunal and that is how the Revenue is before us.

The Tribunal has found that in view of the decision of the Supreme Court in the case of *Indian Cement Limited Vs. Commissioner of Income*, (1966) 60 ITR 52, the act of borrowing money is incidental to the carrying on of business. The loan taken by the Assessee by issue of non convertible debentures is not an asset or advantage of an enduring nature and that the expenditure is incurred for securing the use of money for a certain period.

The Tribunal drew attention to paragraph 45 of Boards Circular No. 56 dated 19th March, 1971 explaining the scope of Section 35 of the Act. In terms of this Circular, it is explained that where the Assessee was already in business and incurred expenditure on the issue of debentures, then certain expenditure was admissible as a



deduction against profits of the year in which it is incurred. Reference has been drawn to the decision of the Supreme Court in **India Cement Limited**. It was clarified that Section 35D was not intended to supersede any provision of law under the Income Tax Act. Paragraph 45 of this Circular reads as follows:-

"It may be noted that the provision for amortisation 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 Cement Ltd.* [(1966) 60 ITR 52], section 35D will not have the effect of bringing that expenditure within the scope of the expenditure to be amortised against profits over a 10 year period. As a corollary to this, where any expenditure has been included for the purpose of amortisation under section 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 section (6) of section 35D."

Learned counsel for the Respondent has also drawn our attention to **Commissioner of Income Tax vs M/s. Thirani Chemicals Ltd.** In **ITA No. 850/2005** decided on 1st December, 2005 wherein a similar question had arisen and the appeal filed by the Revenue was dismissed.

The Division Bench had relied upon the decision of the Supreme Court in **India Cement Limited** as also the Circular that we



have referred to.

Following the decision rendered by the Division Bench with which we find no reason to disagree, we find that no substantial question of law arises for our consideration.

Under the circumstances the appeal is dismissed. It is noticed that there is another appeal which deals with the same issue in ITA No. 213/05 which has been admitted and a substantial question of law framed on 3rd October, 2005. It appears that, that appeal was admitted ex-parte.

In view of the fact that the issue is no longer alive the Registry is directed to list ITA 213/05 in this Court on 20th September, 2006. Similarly, ITA No. 536/04 be also listed by the Registry.

A copy of the order passed by us would be placed on the files of ITA No. 213/05 and ITA No. 536/04.



MADAN B. LOKUR, J



VIPIN SANGHI, J

SEPTEMBER 12, 2006
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