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* IN THE HIGH COURT OF DELHI AT NEW DELHI

+ ITA 854/2006

CIT Appellant
Through: Mr. R.D. Jolly, Adv.

versus

PENCH POWER LTD. Respondent
Through: Mr. Sandeep Kr. Batra, Adv.

WITH

ITA 257/2008

CIT Appellant
Through: Mr. R.D. Jolly, Adv.

versus

PENCH POWER LTD. Respondent
Through: Mr. Sandeep Kr. Batra, Adv.

WITH

ITA 275/2008

CIT Appellant
Through: Mr. R.D. Jolly, Adv.

versus

PENCH POWER LTD. Respondent
Through: Mr. Sandeep Kr. Batra, Adv.

Date of Decision : 15th January, 2009



CORAM:
HON'BLE MR. JUSTICE VIKRAMAJIT SEN
HON'BLE MR. JUSTICE RAJIV SHAKDHER

1. Whether reporters of local papers may be allowed to see the Order?
2. To be referred to the Reporter or not?
3. Whether the Order should be reported in the Digest?

Admit.

After hearing learned counsel for the parties the following substantial questions of law are framed:-

- (a) Whether the Tribunal was correct in law in holding that the assessee could set-off interest earned from MPSEB deposit against interest paid on borrowings from GE Capital Service for the said purpose and capitalise the difference as pre-operative expenses?
- (b) Whether the Tribunal was correct in law in accepting the alternative plea of the assessee that even if interest earned on MPSEB deposit is held as 'income from other sources', the interest paid on borrowings could be set-off under Section 57(iii) of the Income Tax Act, 1961?
- (c) Whether the Order passed by the learned ITAT is perverse.

These Appeals pertain to the Assessment Years (AY) 1999-2000, 2002-2003 and 2003-2004. The Assessee/Respondent had filed Returns declaring 'NIL' income, after setting-off interest



earned by it from short term deposits against interest paid on the capital borrowed by it, as per the following TABLE:

| Relevant Assessment Year | Interest Paid | Interest Earned | Preoperative Expenditure Pending Capitalisation |
|--------------------------|-----------------|-----------------|-------------------------------------------------|
| 1 | 2 | 3 | 4 |
| 1999-2000 | 4,22,50,205 | 2,79,73,601 | 1,42,76,604 |
| 2000-2001 | Not referred to | | |
| 2001-2002 | -do- | | |
| 2002-2003 | 7,39,72,162 | 5,00,06,026 | 29,79,75,019 |
| 2003-2004 | 9,24,29,121 | 6,12,52,861 | 3,11,76,260 |

The Assessing Officer (AO) applied the ratio of *Tuticorin Alkali Chemicals and Fertilizers Ltd. -vs- CIT*, (1997) 227 ITR 172 and framed an assessment in which, *inter alia*, the interest earned was subjected to tax under the head - "Income from Other Sources". The Appeal for AY 2002-2003 was decided on 14.3.2005; and those for AY 1999-2000 and 2003-2004 by a common Order dated 24.7.2006 in which the previous Order dated 14.3.2005 was followed. The matter was, however, carried in Appeal to the ITAT. The Assessee's Appeal for AY 2002-2003 was allowed by Bench 'G' in terms of Orders dated 30.9.2005. The Appeals of the Respondent for AY 1999-2000 and 2003-2004 were dismissed by Bench 'C'.



ITAT Delhi Bench 'G' has concluded that "it is an undisputed position that the interest expenditure incurred by the assessee has a direct nexus with the interest income earned by it" (assessee). The ITAT was of the opinion that Section 57(iii) of the Income Tax Act (IT Act) stood attracted in full force in favour of the assessee; and that *Tuticorin Alkali* did not apply since it was not surplus funds that had been invested by the Assessee. In fact, the finding of fact is to the contrary, viz., that "the deposit that had yielded interest income has been made as a business necessity, as a precondition enabling the assessee to bid for the tenders floated by the Madhya Pradesh Electricity Board ... that the loan has been raised specifically to make the deposit with MPSEB, thus suggesting that it had a direct nexus with the deposit which yielded such income". Instead, *CIT -vs- Karnataka Power Corporation*, (2001) 247 ITR 268 and *CIT -vs- Bokaro Steel Ltd.*, (1999) 236 ITR 315 were found by the ITAT to be directly applicable.

ITAT Delhi Bench 'C' has agreed with the finding of fact returned by its Coordinate Bench 'G' that the Assessee had borrowed the monies solely for the purpose of making a deposit with MPSEB in connection with the anticipated project and that, therefore, there was a direct nexus with the borrowings and the



interest paid by the MPSEB on the deposits. It was also of the view that *Tuticorin Alkali* was wrongly applied; that interest income had been permitted to be included in the cost of the project in *Bokaro Steel Ltd.* and *Karnataka Power Corporation.*

Having given the matter careful consideration, we are of the view that there is no perversity in the findings of fact returned by the ITAT. *Tuticorin Alkali* does not apply as the monies invested are not distinct to each other, and are not 'surplus funds'. In *K. Ravindranathan Nair -vs- CIT*, (2001) 247 ITR 178(SC) : 2001(1) SCC 135 it has been prescribed that the Tribunal is the final fact finding forum and its decision can be questioned only if it partakes of a perverse nature, that is, it is indicative of an action, opinion or conclusion which could not reasonably be arrived at; that an incorrect conclusion is not invariably perverse unless it is palpably deliberate or mala fide.

In any event, the matter stands firmly concluded by the Judgment of the Supreme Court in *CIT -vs- Karnal Cooperative Sugar Mills Ltd.*, (2000) 243 ITR 2 which is in these words:-

Leave granted.

In the present case, the assessee had deposited money to open a letter of credit for the purchase of the machinery required for setting up its plant in terms of



the assessee's agreement with the supplier. It was on the money so deposited that some interest has been earned. This is, therefore, not a case where any surplus share capital money which is lying idle has been deposited in the bank for the purpose of earning interest. The deposit of money in the present case is directly linked with the purchase of plant and machinery. Hence, any income earned on such deposit is incidental to the acquisition of assets for the setting up of the plant and machinery. In this view of the matter the ratio laid down by this Court in Tuticorin Alkali Chemicals and Fertilizers Ltd. -vs- CIT, (1997) 227 ITR 172 will not be attracted. The more appropriate decision in the factual situation in the present case is in CIT v. Bokaro Steel Ltd. [1999] 236 ITR 315(SC). The appeal is dismissed. There will be no order as to costs.

As regards the assessee's alternative plea that even if interest income is treated as income from other sources, the interest paid on borrowings taken for the purpose of making the deposit with MPSEB will be available for set-off under Section 57(iii) of the Act, has to be accepted. The Tribunal has returned a finding of fact that the purpose for which loan was taken was to make a deposit with MPSEB. There is a direct nexus between taking of loan and the deposit by the assessee with the MPSEB. Therefore, undoubtedly, this expenditure was incurred wholly




and exclusively for the said purpose and hence, the deduction under Section 57(iii) of the Act will be available to the assessee.

Mr. R.D. Jolly, learned counsel for the Revenue, sought to rely upon *CIT -vs- Shri Ram Honda Power Equip*, (2007) 289 ITR 475 to support his submission that the interest received on deposit with MPSEB, by the assessee could only be assessed under the head 'income from other sources'. A careful perusal of paragraph 35 of the Judgment in *Shri Ram Honda* would show that a Division Bench of this Court that an assessee whose income is assessed under the head "Income from other sources" the assessee would be entitled to deduction in terms of Section 57(iii) of the Act provided there is direct nexus between expense incurred and income earned. The Tribunal has, therefore, according to us, applied the correct principles of law even on this aspect of the matter.

Both the questions are answered in favour of the assessee and against the Revenue. In the result the appeals are dismissed.


VIKRAMAJIT SEN, J.


RAJIV SHAKDHER, J.

JANUARY 15, 2009
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