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THE HIGH COURT OF DELHI AT NEW DELHI

Judgment delivered on: 19.05.2011

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ITR No. 14/1993

COMMISSIONER OF INCOME TAX

..... APPELLANT

Vs

M/S. J.K. SYNTHETICS LTD.

..... RESPONDENT

Advocates who appeared in this case:

For the Appellant : Mr. N.P. Sahni & Mr. Rakesh Sinha, Advocates
 For the Respondent : Mr. P.N. Monga & Mr. Manu Monga, Advocates

CORAM :-

**HON'BLE MR JUSTICE SANJAY KISHAN KAUL
 HON'BLE MR JUSTICE RAJIV SHAKDHER**

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| 1. | Whether the Reporters of local papers may be allowed to see the judgment ? | Yes |
| 2. | To be referred to Reporters or not ? | Yes |
| 3. | Whether the judgment should be reported in the Digest ? | Yes |

RAJIV SHAKDHER, J

1. The captioned reference pertains to assessment year 1984-85. The reference is at the behest of the revenue. We have been called upon to adjudicate the following question of laws:

(i) (a) Whether on the facts and in the circumstances of the case, the ITAT was correct in law in holding that expenses of Rs 3,47,157/- on foreign tour in connection with the new project were not capital in nature?

(b) Whether on the facts and in the circumstances of the case, the ITAT was correct in law in holding that expenses of Rs 61,708/- on modernization and expansion of plant were not capital expenditure?



(ii) *Whether on the facts and in the circumstances of the case, the ITAT was correct in law in holding that expenses of Rs 1,18,845/- incurred on foreign travel by wives of directors were business expenses and incurred wholly and exclusively for the purpose of business?*

(iii) *Whether on the facts and in the circumstances of the case, the ITAT was correct in law in holding that expenses of Rs 1,42,646/- on acquisition of capital assets were not capital expenditure?*

(iv) *Whether on the facts and in the circumstances of the case, the ITAT was correct in law in holding that expenditure of Rs 2,92,200/- on presentation of articles was a business expenditure?*

(v) *Whether on the facts and in the circumstances of the case, the ITAT was correct in law in holding that expenses of Rs 4,07,211/- on presentation of articles debited I general charges account were allowable as business expenditure?*

(vi) *Whether on the facts and in the circumstances of the case, the ITAT was correct in law allowing deduction for expenses on the issue of bonus shares of Rs 1,15,045/- as revenue expenditure?*

(vii) *Whether on the facts and in the circumstances of the case, the ITAT was correct in deleting the addition of Rs 25,66,470/- [correct amount is Rs 11,93,016/- as is evident from the orders of the Assessing Officer and the CIT(A)] on account of deposits for issue of cops written back in the books of accounts?*

(viii) *Whether on the facts and in the circumstances of the case, the Tribunal was right in law to hold that where an assessee had earned sufficient profits in the preceding year, no disallowance on account of interest amounting to Rs 19,57,470/- was warranted even when the actual payments made for the purchase of shares was out of overdraft bank account?*

2. In so far as question no. (1)(a) & (b) are concerned, we have perused the impugned judgment of the Tribunal. Undoubtedly the Tribunal has returned a finding of fact that the expenses were incurred vis-à-vis expansion of an existing business. There is



no challenge to this finding on the ground of perversity. In view of this finding, we agree with the view of the Tribunal, that the expenses ought to be allowed as a deduction as they are in the nature of revenue expenditure. Accordingly, both the questions are answered in the affirmative and, therefore, against the revenue.

3. In so far as question no. (ii) is concerned, the impugned judgment of the Tribunal indicates that they have allowed the expenses incurred on foreign travel of the wives of the directors, evidently based on their own decision rendered in the assessee's case for the assessment years 1982-83.

3.1 Mr Sahni, who appears for the revenue, has not placed before us the order rendered by the Tribunal in respect of assessment year 1982-83. Therefore, we do not have before us for perusal the reasons which propelled the Tribunal to come to this conclusion.

3.2 Mr Monga has cited before the decision of the Kerala High Court in the case of *CIT vs Appollo Tyres Ltd. (1998) 101 TAXMAN 167 (Ker.)*. Based on the said decision Mr Monga says the said expenses be allowed.

3.3 The facts obtaining in the said case seem to suggest that the only reason the court agreed with the assessee, was that, the revenue had not taken a stand that the wives of the Chairman/Managing Director had gone abroad for "private" or "personal gains" and that the wives' trip had been approved by the board of directors of the assessee company. These facts suggest that the said deduction was allowed to the assessee company based on peculiar facts obtaining in that case.

3.4 However, given the fact that reasoning of the Tribunal is not made available to us and, looking at the miniscule nature of the expenditure involved we do not propose to disturb the finding of the Tribunal. This, however, shall not be treated as a precedent for



subsequent assessment years.

4. As regards question no. (iii), we have examined the findings of the Tribunal. A bare perusal of the findings of the Tribunal set out in paragraph 19 of the impugned judgment would show that the details of items which form part of the expense involved (i.e., a sum of Rs 1,42,646/-) is not provided. There is a reference, however, to three (3) items. These being: two items of expense in the sum of Rs 22,238/- and Rs 11,716/- and, a third item which appears to be an expenditure incurred towards cost of imported machinery. The sum involved is not mentioned in the order. Therefore, in our view quite clearly the three items, referred to above, relate to expenses incurred on capital account. Accordingly, in our view, out of a sum of Rs 1,42,646/- expenses towards the said three items would have to be excluded. Since the details of the remaining items are not available, we would have no choice but to sustain the finding of the Tribunal as regards the remaining items. The Assessing Officer shall do the needful while giving effect to the observations made hereinabove. Needless to say the depreciation allowance, if any claimed, will be suitably adjusted. The question is therefore partially answered in favour of the revenue.

5. In regard to question nos. (iv) and (v) we are informed similar questions were subject matter of a decision rendered by this court in ITR no. 264/1986 pertaining to assessment year 1975-76. Those questions were answered in favour of the assessee. Accordingly, these questions will have to be answered against the revenue and in favour of the assessee. It is ordered accordingly.

6. In regard to question no. (vi), Mr Sahni says that on reading of the observations made in paragraph 59 of the impugned judgment it is quite evident that the finding recorded therein is actually in favour of the revenue and, therefore, no question ought to



have been referred for adjudication, by this court. In these circumstances, Mr Sahn not press the question. It is ordered accordingly.

7. As regards question no. (vii), we may at the outset record that even though in the question of law as framed, the addition shown is a sum of Rs 25,66,470/- , the correct amount evidently involved is Rs 11,93,016/-. Both counsels affirm this position.

7.1 Briefly, the facts obtaining in respect of this issue are as follows: The assessee, who is in the business of manufacturing and dealing in yarn, supplied yarn to its customers alongwith “cops”. In respect of the cops, the assessee would seek refundable deposits, from its customers. The assessee had received substantial deposits uptill the year 1974 which, it sought to write back in its profit and loss account as these were not, evidently claimed by the customers. It is also not in dispute that the deposits taken in respect of the cops were credited to the “*Cops Deposit Account*” which was shown in the assessee’s balance sheet as a liability.

7.2 The contention of the revenue was, which is now propounded by Mr Sahni quite vigorously before us, that since the write back in the profit and loss account took place in the assessment year in question (i.e., 1984-85), the amount received towards deposits because amenable to tax in the assessment year in issue. In other words the amount towards the deposit was in the nature of trading receipt.

7.3 Mr Monga appearing for assessee, however, contends to be contrary. Mr Monga submits that the amount was shown as a liability in the balance sheet of the assessee. The amount in issue , according to him, was not routed through the trading account and hence did not acquire the character of an income. The write back to the profit and loss account was a mere book entry.

8. We find, on a perusal of the impugned judgment, that this aspect of the matter has



not been examined by the Tribunal. The Tribunal has decided the issue in favour of assessee, on the ground that since, the deposits pertain to a period up to and including assessment year 1975-76; even if, they were construed to as trading receipts, as contended by the revenue, they could not be brought to tax for the relevant assessment year (i.e., assessment year 1984-85). Mr Sahni has, according to us rightly joined issue on this aspect. We agree with Mr Sahni that since the write back took place in assessment year (i.e., A.Y. 1984-85) the issue whether or not it was a trading receipt would have to be construed in this very assessment year (i.e., A.Y. 1984-85).

8.1 This, according to us, however, does not resolve the issue. The Tribunal will have to return a finding as to the true character of the receipt. This can only be determined after a proper adjudication takes place to ascertain the true intention of the contracting parties at the time at which the deposit was made and as to how they intended to treat it if and when an eventuality arose of the like nature. In other words whether it was the intention of the parties to sell the cops in issue and hence the deposit was to be treated as a consideration for such a transaction or as contended by the assessee the deposit was in the nature of a security to secure the return of the cops. Depending on the Tribunal's finding on this crucial issue, would the nature of receipt get determined. Since the Tribunal is yet to do the needful, we remand this issue to the Tribunal for returning a finding on this aspect, after giving due opportunity to both sides. It is ordered accordingly.

9. In so far as question no. (viii) is concerned we may note the following facts which emerge on reading of the impugned order passed by the Tribunal. It appears that the assessee's company had invested its funds in two companies outside India. These companies being: Africa Fibres Ltd. Kenya (in short 'ASFL') and J.K. Satoh Agricultural



Machines Ltd. (in short 'JKS'). In 1981 the assessee company held 10,53,500/- in which were valued at Rs 2.27 crores. The assessee's company holding in 1992, in ASFL, increased by 7.35 lacs shares. Similarly, in JKS the assessee had invested uptill 31.12.1981 a sum of Rs 129.95 crores, which was reflected by 4.50 lacs shares of a face value of Rs 45 lacs. As in the case of ASFL, in 1982 the assessee company increased its shareholding in JKS by another 90,000 shares which were valued at Rs 9 lacs.

9.1 As per the Assessing Officer the additional investments in the two companies had been made from borrowed funds and, therefore, interest paid on borrowed funds to that extent did not represent business expenditure. It was further found by the Assessing Officer that the remittances made by the assessee company for purchase of the said shares were from an overdraft facility made available to it by its banker. On account of these circumstances, in particular, the fact that there was "***direct proof that overdraft facilities had been utilized***" for making investment in shares the Assessing Officer calculated interest at the rate of 15% in respect of such fresh investments, and thus, disallowed a sum of Rs 19,57,470/- on the ground that the pay-out did not constitute a business expenditure.

9.2 It is pertinent to note that the Assessing Officer had made a similar disallowance in assessment year 1983-84. In respect of the said assessment year the Commissioner of Income Tax (Appeals) [in short 'CIT(A)'] directed the Assessing Officer to allow set off of interest against dividend income earned by the assessee. This direction resulted in deduction available to the assessee under Section 80M of the I.T. Act being curtailed.

9.3 In these circumstances, in the assessment year in issue (i.e., A.Y. 1984-85), the CIT(A) followed the decision taken for previous assessment year (i.e., A.Y. 1983-84). Since revenue did not carry the matter in appeal to the Tribunal for assessment year



1983-84, no decision was rendered by the Tribunal in that assessment year. Therefore, in one sense in the assessment year in issue (i.e., A.Y. 1984-85), the Tribunal was deciding the issue for the first time.

9.4 Before the Tribunal it was argued on behalf of the assessee that the findings that borrowed funds had been utilized for the purpose of purchase of shares was not correct as profits earned by the assessee company in the year 1982 was sufficient for investing funds in the aforementioned shares. On behalf of the assessee the available funds position was demonstrated as follows:

	<i>Rs./Lacs</i>
<i>“Profit after tax</i>	<i>24</i>
<i>Add: Depreciation</i>	<i><u>1313</u></i>
<i>(Not being a cash outgoing)</i>	<i>1347</i>
<i>Less: Dividend payment</i>	<i><u>176</u></i>
<i>Net retained cash profit</i>	<i><u>1171”</u></i>

9.5 In sum and substance on behalf of the assessee it was argued that since the assessee had with it cash profit to the tune of Rs 11.71 crores and investments made did not exceed Rs 1.06 crores, it could be easily established that investment in shares had been made only out of profits and not from borrowed funds. It is important to note that the Tribunal decided in favour of the assessee without disturbing the finding of fact recorded in its favour. The crucial observations of the Tribunal in this regard are as follows:

“No doubt factually, there is sufficient cash flow as pointed out above. But in arriving at this figures, the assessee had totally ignored the factual finding that the amount allowed by the banks in the overdraft account has been utilized in making the purchases. It is, therefore, necessary to



reconcile these two findings.....”

9.6 The Tribunal applied the ratio of the decision of the Calcutta High Court rendered in the case of *Indian Explosives Ltd. vs Commissioner of Income Tax, West Bengal-II, Calcutta (1984) 147 ITR 392*. In that case the assessee had paid taxes out of borrowed funds. The Assessing Officer had disallowed the interest paid on such borrowed funds on account of the fact that as the law stood in the assessment year in question in that case (i.e., a.y. 1965-66) such like interest was not admissible for deduction. The matter on a reference reached the Calcutta High Court. The Calcutta High Court came to the conclusion that disallowance was not sustainable. In coming to this conclusion the Calcutta High Court followed its earlier view rendered in the case of *Woolcombers of India Ltd vs CIT (1982) 134 ITR 219* and *Reckitt & Colman of India Ltd. vs CIT (1982) 135 ITR 698 (Cal)* as also two other decisions being *Sterling Trust Ltd. vs IR (1925) 12 TC 868 (CA)* and *CIT vs Ashok Charity Trust (1982) 135 ITR 556 (Cal)*. The High Court extracted (what to our mind was pivotal in coming to the conclusion which it did) the following observations of the House of Lords in *Edinburgh Life Assurance Co. vs Lord Advocate (1909) 5 TC 472 (HL)*:

“Where you are considering the business of a company which has two sources of income, the one subjected to tax and the other not, you are entitled to assume and deem that it has paid the money that it ought to pay according to the most business like way of appropriating the revenue to the expense; further, that even though that has not been done in fact by any separate allocation of the money, as was done here in the later years by putting it at a special bank, still you are entitled to treat the money as having been paid out of the fund which is most favourable to the company, which is, in this case, the taxpayer.”



9.7 Mr Monga who appears for the assessee thus relied upon the observations High Court to contend that disallowance had to be deleted. The learned counsel submitted that even if there was a finding of fact returned that the borrowed funds had been applied for purchase of shares it would have to be assumed in view of the fact that assessee had available with it, at the relevant point in time, more than sufficient cash profits that investment had been made out of the profits of the assessee company and not from borrowed funds.

9.8 It was further contended by Mr Monga that for interest to be allowed as an expenditure against borrowed funds the purpose of its use was irrelevant. Mr Monga contended that since loan was a liability by itself interest paid had to be allowed as a deduction. For this purpose he cited the judgment of the Supreme Court in the case of *India Cement Ltd vs Commissioner of Income Tax, Madras (1966) 60 ITR 52*.

10. On the other hand Mr Sahni argued to the contrary. He submitted that in view of the finding of fact returned by the Tribunal that the assessee had used the overdrafts facility provided by the bank to make investment in the shares of the two companies the judgments rendered to by the counsel for the assessee had no applicability.

11. Before we proceed further we would like to notice two judgments of the Supreme Court, which, according to us would have a bearing on the controversy in issue. The first being the judgment of the Supreme Court in the case of *Travancore Titanium Product Ltd. vs Commissioner of Income Tax, Kerala (1966) 60 ITR 277*. This was a case where the Supreme Court was called upon to decide as to whether wealth tax paid by an assessee on his net wealth was a permissible deduction under Section 10(2)(xv) of the Indian Income Tax Act, 1922. The Supreme Court disallowed the deduction. In coming to this conclusion Supreme Court observed that the charge of tax would remain the same



whether the assets were part of or were used in the trading organization of the c

The assets of the tax payer, whether incorporated or nor, became chargeable to tax because they were owned by him and not because they were used by him in the business. In determining whether an amount expended by the assessee is deductible the nature of expenditure or outgoing must be adjudged in the light of accepted commercial practice and trading principles. The expenditure must be incidental to the business and must be necessitated or justified by commercial expediency. It must be directly and indirectly connected with the business and must be laid out by the tax payer in his character as a trader. To be a permissible deduction, there must be a direct and intimate connection between the expenditure and the character of the assessee as a trader, and not as owner of assets, even if they are assets of the business. This test was qualified by the Constitutional Bench Judgment of the Supreme Court in the case of Indian Aluminium Co. Ltd. vs Commissioner of Income Tax, West Bengal (1972) 84 ITR 735. The majority observed as follows:

“When a person has a dual capacity, of a trader-cum-owner, and he pays tax in respect of property which is used for the purpose of trade, the payment must be taken to be in the capacity of a trader according to ordinary commercial principles”.

11.1 In the *Indian Almunium Co.Ltd (supra)*, the assessee which was a trading company, sought deduction of wealth tax paid by it as a business expenditure. The majority judgment of the Supreme Court came to the conclusion that if the wealth tax was paid on assets which was used for the purposes of business then it had to be allowed as a business expenditure.



11.2 The principle, as duly qualified by the Constitution Bench, in the *Aluminium* (*supra*) was applied by the Supreme Court in the case of *CIT vs Amalgamations Pvt. Ltd. (1997) 226 ITR 188*.

11.3 Amongst various questions that the Supreme Court was called upon to adjudicate, one such question culled out at page 203 of the report pertained to the liability of expenses incurred by the assessee company in relation to remuneration paid to the directors of its subsidiary companies some of whom were common to both, that is, the assessee company and its subsidiary companies.

11.4 Briefly, this issue arose in the background of following facts: the assessee company was a shareholder in several companies and in the relevant assessment years which spanned from 1958-59 to 1962-63, the issue arose qua sixteen (16) such companies. The assessee company was rendering certain common services vis-à-vis subsidiaries, in the form of constitution of a financial committee; providing liaison office in Delhi, constitution of an expert promotion department and internal audit department. The expenditure on maintenance of the liaison office in Delhi and the departments of expert promotion and internal audit was borne by assessee company and thereafter recovered from the subsidiaries. The finance committee was working in an advisory capacity to the subsidiary companies. Advice on several aspects of business pertaining to the subsidiary companies was rendered by the finance committee.

11.5 Under the service agreements executed between the directors and the concerned subsidiary companies, the directors were entitled to remuneration as also commission, calculated on a certain percentage of the profits earned by the subsidiary companies.

11.6 In view of the provisions of Section 198 of the Companies Act, 1956 as it obtained at that point in time there was a ceiling on the overall managerial remuneration.



11.7 In these circumstances, the subsidiary companies found themselves in a position whereby they were unable to pay the contracted remuneration to the said directors. In order to overcome this problem the assessee company passed a resolution whereby it decided to pay that part of the remuneration to the said directors which was over and above the maximum amount permissible under the aforementioned provisions of the Companies Act. In consonance with the said resolution assessee company made payments to the said directors.

11.8 In these circumstances the assessee company claimed deduction of the amounts under the provisions of Section 10(2)(xv) of the Income Tax Act, 1922 in assessment year 1958-59 to 1961-62 and under Section 37 of the I.T. Act (i.e., I.T. Act 1961) for assessment year 1962-63. The Assessing Officer disallowed the expenditure claimed by the assessee company.

11.9 On appeal the Appellate Assistant Commissioner (in short 'AAC') sustained the view of the Assessing Officer. In a further appeal the Tribunal, however, remanded the matter to the AAC for consideration and submission of report on the points mentioned in the order of remand. The AAC after recording further evidence submitted a report whereby he opined that deduction may be allowed in respect of remuneration paid to persons who were also directors of the assessee company and were members of the finance committee. The AAC, however, disallowed the deduction in respect of the remuneration paid by assessee company in respect of the persons who were only directors and employees of the subsidiary and not members of the finance committee.

11.10 The Tribunal on consideration of the report submitted by the AAC came to the conclusion that the entire expenditure which was referable to the remuneration paid by the assessee company ought to be allowed as deduction. The Tribunal came to this view



based on the nature of the business of the assessee company which was to hold shares in the subsidiary companies. The Tribunal was of the view that the assessee company was looking after the interest and welfare of the subsidiary companies only to earn dividend and thus the deduction had to be allowed.

12. The revenue carried the issue to the High Court. The High Court came to the conclusion that even though there was a business activity in the matter of holding investment, the expenditure had not been incurred wholly and exclusively for the purposes of assessee's business. ***In coming to this conclusion the High Court applied the following two tests: (i) the expenditure must be incurred by the assessee in his capacity as a trader; (ii) it must be incidental to the carrying of his business.*** Applying the said tests the High Court came to the conclusion that assessee had failed to establish the nexus between the expenditure incurred and its business. This conclusion was formed on the ground that the assessee company had paid the remuneration to help the subsidiary company out of what was termed as "an inconvenient situation" as a result of ceiling being put in place on remuneration payable to directors. The High Court, therefore, opined that the expenditure was not incurred wholly and exclusively for the business of the assessee. The High Court also rejected the alternative claim put forth by the assessee company that at least that part of the expenditure which was incurred by the assessee company in paying remuneration to its own directors, who were also members of the finance committee, should be allowed as a deduction on the ground that the resolution passed by the assessee company did not articulate that the expenditure had been incurred for the purpose of paying remuneration to its own directors because they rendered services as members of the finance committee. The High Court observed that the



resolution treated directors as a 'class' whether or not they were members of the fi
committee.

12.1 In the appeal, before the Supreme Court, it was inter alia argued on behalf of the assessee that the test laid down in *Travancore Titanium (supra)* and *Indian Aluminium (supra)* was satisfied since the purpose of payment of remuneration to directors of the subsidiary companies was to enable its companies to earn higher profits which would be passed on to the assessee company by way of dividends.

12.2 The Supreme Court rejected this contention primarily on the ground that the expenditure incurred on payment of managerial remuneration to the directors of the subsidiary companies could not be said to be an expenditure incurred in carrying on the business of the assessee company on holding its investments. The court observed that the assessee company could have held its investments and earned dividend without incurring the expenditure. Moreover, as observed by the court the subsidiary companies were not obliged to distribute its profits by way of dividends. The following observations of the Supreme Court being apposite are extracted hereinafter:

“We are unable to accept this contention. The High Court, in our opinion, has rightly pointed out that the business of the assessee company is the holding of investments and if with reference to the business of holding investments, any expenditure had been incurred that could have been allowed as deduction. The expenditure incurred in payment of managerial remuneration to the directors of the subsidiary companies cannot be said to be expenditure incurred in carrying on the business of the assessee company of holding its investments. The assessee company could hold its investments and earn its dividends without incurring this expenditure. Since the subsidiary company was not obliged to distribute by way of dividends the entire profits earned on account of their managerial remuneration paid by the assessee company and the assessee



company was only entitled to dividend from the subsidiary company as and when declared, it cannot be said that there was a direct and immediate connection between the expenditure incurred and the business of the assessee company. The decisions in Tata Sons ltd v CIT (1950) 18 ITR 460 (Bom) and J.R. patel & Sons (P.) Ltd. vs CIT (1968) 69 ITR 782 (Guj) are not applicable to the facts of this case.

12.3 Bearing the aforesaid principle in mind, it is important to note that the claim by the assessee is made essentially under Section 37 of the I.T. Act. It is not in dispute that the assessee had borrowed funds and paid interest thereon. Ordinarily interest would have been allowed on the entire amounts. It appears that during the course of assessment it was discovered that a part of the borrowed funds had been used to make investment in shares. The test under Section 36(1)(iii) of the I.T. Act which permits deduction of interest on borrowed capital or under Section 37 of the I.T. Act is more or less the same. Section 36(i)(iii) uses the expression “*for the purpose of business*”, while Section 37 contains the expression “*laid or expended wholly and exclusively for the purpose of business*”. The Supreme Court in S.A.Builders Vs CIT (A) (2007) 288 ITR 1 has equated the two expression and as a matter of fact applied the test laid down by courts under Section 37 to interpret the expression used under Section Section 36(i)(iii). Taking a cue from the principle enunciated in S.A.Builders the expenditure in the form of interest would have to be allowed if the funds are used for the purposes of business. In order to determine as to whether the expenditure incurred is for the purposes of business, it has to be ascertained whether the act of investment in shares was commercially expedient. In other words whether there was a nexus between the expenditure made and the business of the assessee. It is not in dispute that the business of the assessee is to manufacture and deal in yarn. In making investment in shares by taking recourse to borrowed funds, the



assessee company may have acquired an asset and became its owner, it ha necessarily incurred expenditure for the purposes of the business. It has to be borne in mind that a deduction under Section 37 of the I.T. Act is available to an assessee while calculating “profits and gains from business and profession” under Section 28 of the I.T. Act. It cannot be disputed that on acquiring shares in a company the assessee would stand to gain by way of dividend which would add to the income of the assessee. But this income would not be a business income as understood under Section 28 of the I.T. Act. Therefore, given the fact that there was a clear finding as regards the utilization of borrowed funds in the investment made in shares, the disallowance made by the Assessing Officer will have to be sustained. The Tribunal having not disturbed this finding of fact, in our view, could not have invoked principle set forth in Indian Explosive (supra). Those were cases where there was a mixing of funds and therefore presumption was made that expenses may have been incurred out of profits of the company. In the present case there is no scope for such a presumption. Therefore, in our opinion, the conclusion arrived at by the Tribunal has to be reversed. Consequently, question no. (viii) is answered in the negative and in favour of the Revenue.

13. With the aforesaid observations the reference is disposed of.

RAJIV SHAKDHER, J

SANJAY KISHAN KAUL, J

MAY 19, 2011

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