



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

+ **ITA No.213 of 2010**

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Reserved On: March 23, 2011
Pronounced On: June 03, 2011.

CITI FINANCIAL CONSUMER FINANCE INDIA LTD.
. . . Appellant

VERSUS

COMMISSIONER OF INCOME TAX . . . Respondent

Counsel for the Appellant:

Mr. C.S. Aggarwal, Sr.
 Advocate with Mr. Prakash
 Kumar, Advocate.

Counsel for the Respondent:

Ms. Prem Lata Bansal, Sr.
 Advocate with Mr. Deepak
 Anand, Advocate.

CORAM :-

HON'BLE MR. JUSTICE A.K. SIKRI
HON'BLE MR. JUSTICE M.L. MEHTA

1. Whether Reporters of Local newspapers may be allowed to see the Judgment?
2. To be referred to the Reporter or not?
3. Whether the Judgment should be reported in the Digest?

A.K. SIKRI, J.

1. The appellant-assessee herein is a Non-Banking Financial Company (NBFC) and is primarily engaged in hire, purchase, lease and financing. For the instant Assessment Year, i.e.,



1998-99, the appellant filed income tax return declaring a loss of ₹3,82,00,783/-. The Assessing Officer (AO) issued intimation under Section 143(1)(a) of the Income Tax Act (hereinafter referred to as 'the Act') accepting the returned loss. Return of income was revised on 27.12.1999, declaring a loss of ₹4,26,50,098/-. The revised return was also processed under Section 143(1) of the Act, at the returned loss. During the instant assessment year, the appellant had incurred an expenditure of ₹52,70,636/- on account of commission paid to the Direct Selling Agents (DSA) for their services in sourcing hirers in the year in which the loan is disbursed and debited its Profit & Loss account by a sum of ₹48,38,636/- for the purpose of accounting was treated as deferred revenue expenditure. The appellant claimed a deduction on entire sum of ₹52,70,636/- incurred during the year as a deduction on the ground that the expenditure was incurred during the year and being revenue in nature, is fully allowable as deduction. The AO framed the assessment under Section 143(3) of the Act determining the loss at ₹2,34,24,570/-, *inter alia*, making various disallowances/additions.



2. The only dispute in this appeal is in respect of disallowance of ₹48,38,636/- out of the commission paid by the appellant company to its DSAs for their services in sourcing hirers.

3. The CIT (A) upheld the addition of ₹48,38,636/- made by the AO on account of disallowance out of the commission paid to the DSAs during the year. He held that the expenditure incurred in a deferred revenue expenditure and sought to draw his conclusion on the basis of the judgment of Apex Court in the case of ***Madras Industrial Investment Corporation Vs. Commissioner of Income Tax [225 ITR 802 (SC)]***. According to the CIT (A), the aforesaid judgment was applicable to the facts of this case, as the commission is determined and paid with reference to the period of loan and therefore, needed to be spread over the said period and thus, had to be treated as deferred revenue expenditure over a period of loan, it could be not said that the entire expenditure related to the Assessment Year in question.

4. The Income Tax Appellate Tribunal (hereinafter referred to as 'the Tribunal') by the impugned order, however, has restored the matter to the file of AO for afresh adjudication of the disallowance made of ₹48,38,636/-, out of the total claim of the



expenditure incurred of ₹52,70,636 on account of commission paid to the DSAs, to the file of the AO with certain directions. The Tribunal took into consideration the terms of the Agreement as per which commission was payable to the DSAs.

The term regarding payment stipulates as under:

“1. The company shall pay the DSA as per case brokerage and a farther brokerage on the volume of business generated which will be communicated to it from time to time against their making available to the company their expertise. The DSA will under no circumstance pass on the said brokerage or apart of it to any prospective applicants in any form whatsoever.

2. The DSA shall ensure collection of upfront process in fee from the borrower in favour of the company, and remit the same to the company. Thereafter the company shall pay the DSA share separately as decided mutually by the company and the DSA.”

5. Taking note of this stipulation, the Tribunal has taken the view that the assessee's liability to pay the commission partly arises at the time when the DSA sources the hirer and partly on the volume of business generated. The assessee disburses the amount only after receiving the upfront processing fee from the prospective borrowers. It is also accepted fact that upfront processing fee is taxed in the year of receipt itself and not spread over the period of hire-purchase finance. Therefore, according to the Tribunal, payment of commission is not based on the hire-purchase charges receivable by the assessee but on



the basis of hirer sourced by the DSA and in respect of such hirer the processing fee is received, which is allowable in the year of payment. This shows that the Tribunal accepted the contention of the assessee in principle. Still, it remitted the case back to the AO on the ground that the copies of contracts with DSA placed before us do not demonstrate as to what are the services rendered by the DSAs and therefore, it was not possible to work out as to how the liability to pay such brokerage arises. The Tribunal further observed that the Agreement showed that the DSAs were to source the borrower, but the terms of Agreement did not reveal as to on which basis the brokerage is payable and was linked to what, or how the assessee would be liable to pay such brokerage. According to the Tribunal, therefore, there was no sufficient material to give a finding as to the allowability of entire brokerage in the year of payment itself. Moreover, when the assessee itself treats the expenses as to be amortized over period beyond the relevant financial year. With this discussion, the precise directions given to the AO are as under:

“The Assessing Officer shall consider how the brokerage paid is worked out and is linked to what nature of income receivable by the assessee. If the brokerage payable is linked to hire charges which are receivable over period of hire purchase finance, the brokerage will also be allowed accordingly. However, if it is otherwise, the same will be allowed in the year of payment itself. Even in case of



Ashima Syntex Ltd. (supra) the Special Bench of ITAT has laid down similar criteria. Accordingly the matter is restored back to the file of the Assessing Officer to be decided in accordance with our above observations.”

6. The submission of Mr. C.S. Aggarwal, Sr. Advocate who appeared for the assessee was that there was no need to remit the case back to the AO when the Tribunal had the entire material before it and could form an opinion itself on the basis of said material. Attention was drawn to the provisions of Section 251 of the Act which lays down the scope of powers with the Commissioner (Appeals) and it was argued that the powers of the Commissioner (Appeals) are co-terminus of that of the AO. Proceeding on this basis, it was argued that since the Tribunal was given power to pass such orders in the appeal as thinks fit, it could pass the orders of its own on the merits of the case, instead of remanding the case back to the AO. Mr. Aggarwal, placed reliance upon the judgment of the Supreme Court in the case of ***Hindustan Ferodo Ltd. Vs. Collector of Central Excise, Bombay [89 ELT 16]*** wherein the Supreme Court laid down the guidelines as to how the appellate powers were to be exercised by the Tribunal in the following manner:

“4. It is not the function of the Tribunal to enter into the arena and make suppositions that are tantamount to the evidence that a party before it has failed to lead. Other than supposition, there is no material on record that suggest that a small scale or medium scale manufacturer of



brake linings and clutch facings “would be interested in buying” the said rings or that they are marketable at all. As to the brittleness of the said rings, it was for the Revenue to demonstrate that the appellants’ averment in this behalf was incorrect and not for the Tribunal to assess their brittleness for itself. Articles in question in an appeal are shown to the Tribunal to enable the Tribunal to comprehend what it is that it is dealing with. It is not an invitation to the Tribunal to give its opinion thereon, brushing aside the evidence before it. The technical knowledge of members of the Tribunal makes for better appreciation of the record, but not its substitution.

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7. Regretably, the Tribunal’s order under appeal shows that it was not fully conscious of the dispassionate judicial function it was expected to perform, and it must be quashed.”
8. He also referred to the judgment of the Apex Court in the case of ***The Indian Molasses Co. Pvt. Ltd. Vs. Commissioner of Income Tax [37 ITR 66]*** which deals with the issue as to what constitutes “expenditure within the meaning of that word” under Section 10(2)(xv) of the Income Tax Act, 1929, which is *pari materia* to Section 32 of the present Income Tax Act. Following observations therefrom were specifically were relied upon:

“Side by side with these principles, there are others which are also fundamental. The income-tax law does not allow as expenses all the deductions a prudent trader would make in computing his profits. The money may be expend on grounds of commercial expediency but not of necessity. The test of necessity is whether the intention was to earn trading receipts or to avoid future recurring payments of a revenue character. Expenditure in this sense is equal to disbursement which, to use a homely phrase, means something which comes out of the trader's pocket. Thus, in



finding out what profits there be, the normal accountancy practice may be to allow as expense any sum in respect of liabilities which have accrued over the accounting period and to deduct such sums from profits. But the income-tax laws decided on not take every such allowance as legitimate for purposes of tax. A distinction is made between an actual liability in present and a liability de future which, for the time being, is only contingent. The former is deductible but not the latter. The case which illustrates this distinction is Peter Merchant Ltd. v. Stedeford. No doubt, that case was decided under the system of income-tax laws prevalent in England, but the distinction is real. What a prudent trader sets apart to meet a liability, not actually present but only contingent, cannot bear the character of expense till the liability becomes real.”

9. There is no quarrel about the aforesaid propositions. No doubt, when the Tribunal is called upon to decide an issue on merits and sufficient evidence/material is on record to decide that issue, it is supposed to render its decision on that issue. However, the Tribunal in the instant case has referred the matter back to the AO categorically recording that there was no sufficient material placed before it to demonstrate as to what were the services rendered by the DSAs from which it could be ascertained as to how allowability to pay such brokerage had arisen and could be worked out. According to the Tribunal, mere Agreement was not sufficient for this purpose, as it does not reveal on what basis the brokerage is payable and is looked into what and how the assessee would be liable to pay such brokerage. Section 254(1) of the Act which confers power upon



the Tribunal to decide the appeal clearly states that after giving opportunity of being heard to both the parties, it may “pass such an order thereon as thinks fit”.

10. After stating the principle on which commission paid by the assessee to DSAs would be treated as expenditure relating to particular areas, for want of sufficient evidence to arrive at a definite finding in this behalf, the Tribunal, in its discretion, remitted the case back to the AO giving clear guidelines how to examine the issue on the basis of records to be produced and what course of action, the AO was supposed to take.
11. We do not find any infirmity in this approach of the Tribunal. No substantial question of law arises. This appeal is dismissed *in limine*.

(A.K. SIKRI)
JUDGE

(M.L. MEHTA)
JUDGE

JUNE 03, 2011

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