



§~105, 107 & 109

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

Date of decision: 25.04.2018

+ **ITA 487/2018 & CM APPL. 16295/2018**

THE PR. COMMISSIONER OF INCOME TAX-CENTRAL-3

..... Appellant

versus

HFCL INFOTEL LTD.

..... Respondent

ITA 489/2018 & CM APPL. 16296-97/2018

THE PR. COMMISSIONER OF INCOME TAX -CENTRAL-3

..... Appellant

versus

HFCL INFOTEL LTD.

..... Respondent

ITA 491/2018 & CM APPL. 16300-01/2018

THE PR. COMMISSIONER OF INCOME TAX -CENTRAL-3

..... Appellant

versus

HFCL INFOTEL LTD.

..... Respondent

Present: Mr. Ruchir Bhatia, Advocate for the Revenue in all the matters.

CORAM:

HON'BLE MR. JUSTICE S. RAVINDRA BHAT

HON'BLE MR. JUSTICE VINOD GOEL

HON'BLE MR. JUSTICE S. RAVINDRA BHAT (ORAL)

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1. The Revenue urges four questions of law in these appeals; the first pertains to the payment of expenditure towards liquidated



damages sought to be capitalised under Section 35ABB of the Income Tax Act, 1961 (hereinafter 'the Act'). The Income Tax Appellate Tribunal (hereinafter 'ITAT') in this case noticed that the amount was payable on account of certain terms which required the assessee to pay licence fees under the then prevailing telecom policy for the operation of the telecom services which it was awarded for the State of Punjab.

2. The Assessing Officer, after issuing show cause notice, determined that the liquidated damages did not amount to a legitimate expenditure incurred for obtaining the licence, and therefore, was not directly attributable towards that expense, therefore, we disallow that expenditure.

3. The ITAT in its impugned decision analysed the terms of the agreement and concluded as follows:-

"3.6 Considering above submissions, we find that undisputedly payment of liquidated damages and interest charges thereon have been made as per, clauses 12.2 to 12.4 of the aforementioned licence agreement between the assessee and DOT, whereby it has been made obligatory on the part of the assessee company to pay interest and liquidated damages in case of failure to deliver the services or part thereof within the period prescribed. Liquidated damages and interest thereon have been made to DOT due to non-fulfilment of obligations specified in the agreement in time, where time was an essence. These payments have been incurred in the course of obtaining the rights to operate telecommunication services and not for any breach/ violation of any law. As per the



decision in the case of CIT vs. Indo Asian Switch Gears P. Ltd. (supra) the payment of damages is for breach of contract and not on account of infraction of law and, therefore, the same is admissible as expenses having been expended wholly and exclusively for the purposes of business. When we examine the facts of the present case in view of the ratio laid down in the above cited decision, we find that the assessee in the present case has paid liquidated damages and interest thereon due to breach of the agreement and not as a breach of law. Thus, the expenditure claimed does not fall within Explanation to section 37(1) of the Act. And since it was incidental to business, it cannot be disallowed. The ld. CIT(A) was thus justified in deleting the disallowance in question. The same is upheld. The issue is accordingly decided in favour of the assessee."

4. It was sought to be urged by the Revenue that the expenditure was by way of a penal payment, and therefore, it was not permissible.

5. The Court is of the opinion that the non-fulfillment of the obligation automatically resulted in the liability to pay the amount which was characterised as penalty. In reality – as noticed by the ITAT, the payment was by way of an agreed liquidated damage for breach of contract and by no stretch of imagination could be held to be equated to a penal payment on account of infraction of law. Consequently, the Court holds that the ITAT's findings are sound and no question of law arises on this aspect.



6. The second issue is with respect to the disallowance of the expenses incurred by the assessee for the assessment years under consideration. The AO held that such expenditure was not wholly and exclusively incurred for business purposes. The CIT(A) and the ITAT both held otherwise. The ITAT's reasoning is as follows:-

“4.3 Considering the above submissions and the decision cited in support we do not find any infirmity in the first appellate order on the issue as considering the expenditure incurred and nature of industry, the amount incurred by the assessee for corporate club membership fees is held for business promotion. The first appellate order in this regard is thus upheld. The issue is thus decided in favour of the assessee. The related grounds of the appeals are accordingly rejected.”

7. We are of the opinion that the above are concurrent findings of the ITAT that do not call for any interference. No substantial question of law arises on this aspect too.

8. The third question urged by the Revenue is related to disallowance under Section 14-A of the Income Tax Act, 1961. Here, the lower appellate authorities concluded that the disallowance was impermissible because the AO did not reject the alternative submission and the assessee's offer towards voluntary disallowance and rather straightway proceeded to apply the principles prescribed in Rule 8D of the Act. This issue is covered against the Revenue in the recent judgment of the Supreme Court in the case of 'Godrej & Boyce



Manufacturing Co Ltd. vs. DCIT', (2017) 394 ITR 449 (SC). This question of law therefore does not arise.

9. The last and the fourth question of law urged by the Revenue in ITA 491/2018 is the capitalisation of the amount by the assessee under Section 36(1)(iii) of the Act. This issue too is covered against the assessee for another A.Y. in the common order in ITA 459-460/2016 (Pr. Commissioner of Income Tax vs. HFCL Infotel Ltd., decided on 16.04.2018). The Court had then relied upon the decision of the Bombay High Court in the case of '*Commissioner of Income Tax vs. Reliance Utilities & Power Ltd.*', (2009) 313 ITR 340 while noticing at the same time that the assessee was in possession of large substantial amount from which it could service the interest liability. No substantial question of law arises on this account as well.

10. For the above reasons, all these appeals are without merit and are dismissed along with the pending applications.


S. RAVINDRA BHAT, J


VINOD GOEL, J

APRIL 25, 2018

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