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WIPRO FINANCE LTD.

v.

COMMISSIONER OF INCOME TAX

(Civil Appeal No. 6677 of 2008)

B

APRIL 12, 2022

[A. M. KHANWILKAR, ABHAY S. OKA AND C. T. RAVIKUMAR, JJ.]

Income Tax Act, 1961: s.37 – Disallowance – Loan borrowed by assessee in foreign currency for expanding its primary business of leasing and hire purchase of capital equipment to existing Indian enterprise – While repaying the loan, due to the difference of rate of foreign exchange, the assessee had to pay higher amount, resulting in loss to the appellant –Claim for deduction on account of loss of income owing to exchange fluctuation – Held: Transaction of loan was in nature of borrowing money which was necessary for carrying on its business of financing – It was the activity concerning the business of the assesseeand not for creation or acquisition of asset by appellant for its primary business – Hence, assessee was entitled to claim deduction of entire expenditure or loss suffered in connection with such a transaction in terms of s.37 of the 1961 Act – With respect to the fresh claim set up by assessee before ITAT that revenue expenditure of certain amount was erroneously capitalized in returns – As no objection was taken by department before ITAT, hence, cannot be contradicted at this stage.

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India Cements Ltd. v. Commissioner of Income Tax, Madras **AIR 1966 SC 1053 : [1966] 2 SCR 944;** *Empire Jute Co. Ltd. v. Commissioner of Income Tax* **(1980) 4 SCC 25 : [1980] 3 SCR 1370 – relied on.**

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National Thermal Power Co. Ltd. v. Commissioner of Income Tax (1997) 7 SCC 489; *Goetze (India) Ltd. v. Commissioner of Income Tax* **[2006] 284 ITR 323;** *Assistant Commissioner of Income Tax, Vadodara v. Elecon Engineering Company Limited* **(2010) 4 SCC 482 : [2010] 3 SCR 108 – referred to.**

H

Case Law Reference

(1997) 7 SCC 489	**referred to**	**Para 3**
[1966] 2 SCR 944	**relied on**	**Para 7**
[1980] 3 SCR 1370	**relied on**	**Para 7**
[2006] 284 ITR 323	**referred to**	**Para 11**
[2010] 3 SCR 108	**referred to**	**Para 12**

CIVIL APPELLATE JURISDICTION: Civil Appeal No. 6677 of 2008.

From the Judgment and Order dated 02.04.2008 of the High Court of Karnataka at Bangalore in I.T.A. No.633 of 2014.

S. Ganesh, Arijit Prasad, Preetesh Kapur, Sr. Advs., Tejveer Bhatia, K. R. Pradeep, Rohan Swarup, Gaurav Sharma, Abhinav Mukerji, Ms. Archana Sachdeva, Ms. Pragati Agrawal, Vikramjit Banerjee, Shailesh Madiyal, Siddhartah Sinha, Jauhri Prakash, Tathagat, Nring C. Zehiang, Abhishek Mahajan, Prashant Rawat, O. P. Shukla, Kumar Shashank, Raj Bahadur Yadav, Senthil Jagadeesan, Ms. Sonakshi Malhan, Advs. for the appearing parties.

The following Order of the Court was passed:

ORDER

1. This appeal takes exception to the judgment and order dated 2.4.2008 passed by the Division Bench of the High Court of Karnataka at Bengaluru in I.T.A. No. 633/2004.

2. Briefly stated, the appellant company submitted returns of income on 29.11.1997 for the assessment year 1997-1998, mentioning loss of income, amongst others, owing to exchange fluctuation of Rs.1,10,53,909/-. After processing the return under Section 143(1)(a) of the Income Tax Act, 1961[1], the assessment was completed on 16.3.2000. As against the loss declared by the appellant due to exchange fluctuation, the assessment was concluded by positive taxable income. Against that decision, the matter was carried in appeal by the appellant before the Commissioner of Income Tax (Appeals)[2] and eventually, by way of appeal before the Income Tax Appellate Tribunal[3] being I.T.A. No. 795 (Bang)/ 2000.

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[1] for short, "the 1961 Act"
[2] for short, "CIT(A)"
[3] for short, "ITAT"

A 3. In the appeal before the ITAT, the appellant not only claimed deduction in respect of loss of Rs.1,10,53,909/- arising on account of exchange fluctuation, but also set up a fresh claim in respect of revenue expenses to the tune of Rs.2,46,04,418/-, erroneously capitalised in the returns. The ITAT entertained this fresh claim set forth by the appellant and recorded in its judgment that the department's representative had
B no objection in that regard. Additionally, the ITAT adverted to the decision of this Court in ***National Thermal Power Co. Ltd. vs. Commissioner of Income Tax***[4] in support, for entertaining fresh claim of the appellant in exercise of powers under Section 254 of the 1961 Act. The ITAT, in the first place, reversed the finding given by CIT(A) regarding application
C of Section 43A of the 1961 Act. The ITAT opined that the said provision had no application to the fact situation of the present case. Having said that, it then proceeded to consider the question whether the loss suffered by the appellant owing to exchange fluctuation can be regarded as revenue expenditure or capital expenditure incurred by the appellant,
D and answered the same in favour of the appellant by holding that it would be a case of expenditure on revenue account and an allowable deduction. The ITAT answered the same in the following words: -

> "….. So far as the argument whether the impugned expenditure
E or loss is revenue or capital in nature we find that the funds borrowed were utilised for the purposes of regular finance business carried on by the assessee. Such an income has also been offered for taxation and accepted by the department. Quantification of exchange fluctuation loss has been done as per rule 115 of the I T Rules. Said rule must be applied in computing the total income of the assessee had held by the Supreme Court in CIT vs. Chowgule
F Co Ltd. – 218 ITR 384. **Further the exchange fluctuation loss is an expenditure incidental to carrying on of business and comes within the purview of section 37 of the Act as the same is incurred wholly and exclusively for the purposes of business. It is nobody's case that the funds borrowed in**
G **foreign exchange have been diverted for non-business purposes**. In such a case the decision of the Supreme Court in India Cement Case (supra) fully covers the issue in favour of the assessee. We also find that in this case, assessee's claim satisfies all the tests laid down by Supreme Court in 124 ITR 1 extracted

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H [4] (1997) 7 SCC 489

supra. In this case entire borrowal of loan and the utilisation of the same, is in trading operations of the company more profitably and the fixed capital in this case is untouched. Hence the expenditure is on revenue account and allowable.

We also find the loss incurred by the assessee cannot be treated as contingent in nature as the loss on account of foreign exchange fluctuation has been quantified in terms of rule 115 of IT Rules and further the liability is real as per terms of the agreement with CDC. Just because the liability is payable in future does not covert the actual liability into contingent liability as held by the Supreme Court in Calcutta Co Ltd. vs. CIT – 37 ITR 1 and Bharat Earth Movers Ltd. vs. CIT – 245 ITR 428. Similar view has been expressed by ITAT special bench in ONGC case 83 ITR 51 (SB). Looking from any angle the claim on this issue is allowable. Accordingly, we allow the entire claim of Rs.3,56,57,727/-. We direct the AO to do so. This issue is held in favour of the assessee."

(emphasis supplied)

4. The matter was carried before the High Court by the department. Amongst others, following questions were formulated for consideration as substantial questions of law concerning subject deduction claimed by the appellant. The same read thus: -

"(3) Whether on facts and in the circumstances of the case, the Tribunal is justified in deleting the dis-allowance of claim to the tune of Rs.1,10,53,509/- for the assessment year 1997-98 in respect of exchange fluctuation that was made by the Assessing Officer? (in ITA No. 633/2004 only).

(4) Whether on facts and in the circumstances of the case, the Tribunal is justified in allowing the additional claim of Rs.2,46,04,418.00 for the assessment year 1997-98 holding that the capitalisation of the said sum is to be treated as revenue expenses? (in ITA No. 633/04 only)."

The High Court vide impugned judgment has reversed the view taken by the ITAT, mainly observing that the ITAT had not recorded sufficient reasons in support of its conclusion and in any case, the conclusion was without any basis.

A 5. We have heard Mr. S. Ganesh, learned senior counsel for the appellant and Mr. Vikramjit Banerjee, learned Additional Solicitor General appearing for the respondent.

6. The broad undisputed relevant facts, as can be culled out from the record are that the appellant entered into a loan agreement with one B Commonwealth Development Corporation having its registered office at England in the United Kingdom, for borrowing amount to carry on its project described in Schedule 1 to the agreement - for expanding its primary business of leasing and hire purchase of capital equipment to existing Indian enterprises. Schedule 1 of the agreement reads thus: -

C "SCHEDULE 1

(referred to in Recital A)

Description of the Project

D The Project consists of the financing by the Company of the acquisition of plant, machinery and equipment to be used in its leasing business in accordance with the applicable laws and regulations of India and the Company's Memorandum and Articles of Association."

The loan was obtained in foreign currency (5 million pounds sterling). However, while repaying the loan, due to the difference of rate E of foreign exchange, the appellant had to pay higher amount, resulting in loss to the appellant. Indeed, the loan amount was utilised by the appellant for financing the existing Indian enterprises for procurement of capital equipment on hire purchase or lease basis. The fact remains that the activity of financing by the appellant to the existing Indian enterprises F for procurement or acquisition of plant, machinery and equipment on leasing and hire purchase basis, is an independent transaction or activity being the business of the appellant.

7. As regards, the transaction of loan between the appellant and Commonwealth Development Corporation, the same was in the nature G of borrowing money by the appellant, which was necessary for carrying on its business of financing. It was certainly not for creation of asset of the appellant as such or acquisition of asset from a country outside India for the purpose of its business. In such a scenario, the appellant would be justified in availing deduction of entire expenditure or loss suffered by it in connection with such a transaction in terms of Section 37 of the Act. H For, the loan is wholly and exclusively used for the purpose of business

of financing the existing Indian enterprises, who in turn, had to acquire plant, machinery and equipment to be used by them. It is a different matter that they may do so because of the leasing and hire purchase agreement with the appellant. That would be, nevertheless, an activity concerning the business of the appellant. In that view of the matter, the ITAT was right in answering the claim of the appellant in the affirmative, relaying on the dictum of this Court in ***India Cements Ltd. vs. Commissioner of Income Tax, Madras***[5]. The exposition in this decision has been elaborated in the subsequent decision of this Court in ***Empire Jute Co. Ltd. vs. Commissioner of Income Tax***[6].

8. The ITAT has extracted the relevant portion of the decision in ***India Cements Ltd.***[7], which reads thus: -

> "7. ….. where there is no express prohibition, an outgoing, by means of which an assessee procures the use of a thing by which it makes a profit, is deductible from the receipts of the business to ascertain taxable income. …..
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> xxx xxx xxx
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> 16. ….. the loan obtained is not an asset or advantage of an enduring nature….. the expenditure was made for securing the use of money for a certain period … and it is irrelevant to consider the object with which the loan was obtained. …..
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> 17. ….. the act of borrowing money ….. was not incidental to the carrying on of a business. ….."

Similarly, the exposition in the case of ***Empire Jute Co. Ltd.***[8] is also extracted by the ITAT, which reads thus: -

> "5. ….. it is not a universally true proposition that what may be capital receipt in the hands of the payee must necessarily be capital expenditure in relation to the payer. The fact that a certain payment constitutes income or capital receipt in the hands of the recipient is not material in determining whether the payment is revenue or capital disbursement qua the payer. …..
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[5] AIR 1966 SC 1053
[6] (1980) 4 SCC 25
[7] supra at footnote No. 5
[8] supra at footnote No. 6

A 8. ….. There may be cases where expenditure, even if incurred for obtaining advantage of enduring benefit, may, nonetheless, be on revenue account and the test of enduring benefit may break down. It is not every advantage of enduring nature, acquired by an assessee that brings the case within the principle laid down in this test. **What is material to consider is the nature of the advantage in a commercial sense and it is only where the advantage is in the capital field that the expenditure would be disallowable on an application of this test. If the advantage consists merely in facilitating the assessee's trading operations or enabling the management and conduct of the assessee's business to be carried on more efficiently or more profitably while leaving the fixed capital untouched, the expenditure would be on revenue account, even though the advantage may endure for an indefinite future.** The test of enduring benefit is therefore not a certain or conclusive test and it cannot be applied blindly and mechanically without regard to the particular facts and circumstances of a given case. …..

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11. ….. "What is an outgoing of capital and what is an outgoing on account of revenue depends on what the expenditure is calculated to effect from a practical and business point of view rather than upon the juristic classification of the legal rights, if any, secured, employed or exhausted is the process."

The question must be viewed in the larger context of business necessity or expediency. ….."

(emphasis supplied)

9. A priori, we are of the considered opinion that the analysis done by the ITAT and the conclusion arrived at in respect of the subject claim of the appellant being the correct approach consistent with the exposition of this Court, needs to be upheld. In our opinion, the High Court missed the relevant aspects of the analysis of the ITAT concerning the fact situation of the present case. As a matter of fact, the High Court has not even adverted to the aforementioned reported decisions, much less its usefulness in the present case.

10. The learned ASG appearing for the department had faintly argued that since the appellant in its return had taken a conscious explicit

plea with regard to the part of the claim being ascribable to capital expenditure and partly to revenue expenditure, it was not open for the appellant to plead for the first time before the ITAT that the entire claim must be treated as revenue expenditure. Further, it was not open to the ITAT to entertain such fresh claim for the first time. This submission needs to be stated to be rejected. In the first place, the ITAT was conscious about the fact that this claim was set up by the appellant for the first time before it, and was clearly inconsistent and contrary to the stand taken in the return filed by the appellant for the concerned assessment year including the notings made by the officials of the appellant. Yet, the ITAT entertained the claim as permissible, even though for the first time before the ITAT, in appeal under Section 254 of the 1961 Act, by relying on the dictum of this Court in ***National Thermal Power Co. Ltd.***[9]. Further, the ITAT has also expressly recorded the no objection given by the representative of the department, allowing the appellant to set up the fresh claim to treat the amount declared as capital expenditure in the returns (as originally filed), as revenue expenditure. As a result, the objection now taken by the department cannot be countenanced.

11. Learned ASG had placed reliance on the decision of this Court in ***Goetze (India) Ltd. vs. Commissioner of Income Tax***[10] in support of the objection pressed before us that it is not open to entertain fresh claim before the ITAT. According to him, the decision in ***National Thermal Power Co. Ltd.***[11] merely permits raising of a new ground concerning the claim already mentioned in the returns and not an inconsistent or contrary plea or a new claim. We are not impressed by this argument. For, the observations in the decision in ***Goetze (India) Ltd.***[12] itself make it amply clear that such limitation would apply to the "assessing authority", but not impinge upon the plenary powers of the ITAT bestowed under Section 254 of the Act. In other words, this decision is of no avail to the department.

12. Learned counsel for the department had also relied on the decision of this Court in ***Assistant Commissioner of Income Tax, Vadodara vs. Elecon Engineering Company Limited***[13]. This decision is on the question of application of Section 43A of the 1961 Act.

[9] supra at footnote No. 4
[10] [2006] 284 ITR 323
[11] supra at footnote No. 4
[12] supra at footnote No. 10
[13] (2010) 4 SCC 482

A Accordingly, the exposition in this decision will be of no avail to the fact situation of the present case. For, we have already noticed that the appellant had not acquired any asset from any country outside India for the purpose of his business.

13. In view of the above, this appeal ought to succeed. The B impugned judgment and order of the High Court needs to be set aside and instead, the decision of the ITAT dated 3.6.2004 in favour of the appellant on the two questions examined by the High Court in the impugned judgment, needs to be affirmed and restored. We order accordingly.

C 14. As a result of allowing the entire claim of the appellant to the tune of Rs.3,56,57,727/- being revenue expenditure, suitable amends will have to be effected in the final assessment order passed by the assessing officer for the concerned assessment year, thereby treating the consequential benefits such as depreciation availed by the appellant-assessee in relation to the stated amount towards exchange fluctuation D related to leased assets capitalised (being Rs.2,46,04,418/-), as unavailable and *non-est*.

15. The appeal is allowed in the above terms with no order as to costs.

E Pending interlocutory applications, if any, stand disposed of.

Devika Gujral Appeal allowed.