IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATE: 08.03.2021

CORAM:

THE HON'BLE MR. JUSTICE M.DURAISWAMY
AND
THE HON'BLE MRS.JUSTICE T.V.THAMILSELVI

T.C.A.No.986 of 2013

Commissioner of Income Tax,
Chennai. ... Appellant

Vs.

M/s.Ambika Cotton Mills Ltd.,
9A, Valluvar Street,
Sivananda Colony,
Coimbatore – 641 012. ... Respondent

Appeal preferred under Section 260A of the Income Tax Act, 1961, against the order of the Income Tax Appellate Tribunal, Madras, "C" Bench, dated 16.04.2013 in I.TA.No.1836/Mds/2012 Assessment Year 2005-06.

For Appellant : Mr.T.R.Senthil Kumar,
Senior Standing Counsel
assisted by Mrs.K.G.Usha Rani

For Respondent : Ms.Sriniranjani Srinivasan

JUDGMENT

(Judgment was delivered by M.DURAISWAMY, J.)

Challenging the order passed in I.T.A.No.1836/Mds/2012 on the file of the Income Tax Appellate Tribunal, Chennai, "C" Bench for the Assessment Year 2009-10.

2.The appeal was admitted on 10.04.2014 on the following substantial question of law:

> "Whether on the facts and circumstances of the case, the Tribunal was right in holding that the proceeds realized by the assessee on sale of Certified Emission Reduction Credit, which the assessee had earned on the Clean Development Mechanisam in its wind energy operations, is a capital receipt and not taxable?"

3.When the appeal is taken up for hearing, Mrs.K.G.Usha Rani, learned Standing Counsel appearing for the appellant/Revenue fairly submitted that the question of law involved in the present appeal is covered by the decision of the Division Bench of this Court dated ***19.01.2021*** made in ***T.C.A.No.451 of 2018 [S.P.Spinning Mills Pvt.***

Ltd., 1/147/104, Cuddalore Main Road, Kariapatti, Salem – 636 106 Vs. Assistant Commissioner of Income Tax, Circle – I(3), 3 Gandhi Road, Salem – 636 007] wherein the Division Bench held as follows:

"...

14.With regard to the disallowance on the deduction under Section 80IA of the Act, the CIT(A) noted the decision of the Chennai Tribunal relied on by the assessee in the case of ***Ambica Cotton Mills Ltd., vs. DCIT [I.T.A.No.1836/Mds/2012, dated 16.04.2013]***, wherein it was held that carbon credit receipts cannot be considered as business income and it is a capital receipt. Hence, the assessee's claim under Section 80IA of the Act is untenable, as deduction under Section 80IA of the Act is allowable only on profits and gains derived by an undertaking.

...

28.Insofar as substantial question of law no.4 is concerned, it deals with carbon credit. The question, as to the manner in which carbon credit receipt has to be treated, has been considered by several High Courts and it has been held that the receipt should be treated as a capital receipt. In this regard, it would be beneficial to refer to the decision in the case of ***CIT vs. Subhash Kabini Power Corporation Ltd., [(2016) 385 ITR 0592 (Karn.)]***. In the said decision, the

Karnataka High Court approved the view taken by the ITAT, Hyderabad Bench, which decision was upheld by the High Court of Andhra Pradesh in the case of ***CIT vs. My Home Power Ltd. [(2014) 365 ITR 0082 (AP)]***, which was subsequently followed by the ITAT, Chennai and Jaipur Benches. The operative portion of the judgment reads as follows:-

"11.The decision has been upheld by the Hon'ble Andhra Pradesh High Court. This decision has been subsequently followed by the ITAT Chennai and Jaipur Benches. There is no decision either from the Hon'ble Supreme Court or from the Hon'ble jurisdictional High Court. These decisions indicate that sale of carbon credit would result capital receipt which is not taxable. When we confronted the learned DR with regard to this position, it was contended that the position as on the day when the assessment order was passed, is to be seen and on that day these orders were not available. Therefore, the assessee cannot claim the benefit of these orders. However, we do not concur with this proposition of the learned CIT, because the Full Bench of the Hon'ble Punjab & Haryana High Court in the case of Aruna Luthra reported in 254 ITR 76 has held that a Court decide a dispute between the parties. The case can involve decision on facts. It can also involve a decision

on point of law. Both may have bearing on the ultimate result of the case. When a Court interprets a provision, it decides as to what is the meaning and effect of the words used by the Legislature, it is the declaration regarding the statute. In other words the judgment declares as to what the legislature had said at the time of promulgation of the law, the declaration is....., this was the law, this is the law, this is how the provision shall be construed. Therefore, he cannot plead that the view taken by the Tribunal and upheld by the Hon'ble Andhra Pradesh High Court could be considered as if applicable from the date of the decision. In the decision only the position of the law as to how receipts from sale of carbon credits are to be treated, has been explained. One of the argument raised by the DR was that at this stage, the additional ground ought not to be permitted to be raised. It is pertinent to mention here that basically, it is not a separate ground, it is a limb of arguments, which is affecting the ultimate tax liability of the assessee. The Hon'ble Supreme Court in the case of NTPC Ltd (Supra) has held that the Tribunal had jurisdiction to examine a question of law which arose from the fact as found by the Income Tax authorities and having a bearing on the tax liability of the assessee. As far as the nature of the receipt from sale of carbon credit is concerned, it is available from the assessment stage. It is not

disputed even by the learned Commissioner, the dispute is, whether it has been derived from the eligible industrial undertaking for qualifying the grant of deduction u/s 80IA. The learned Commissioner felt that this receipt has not been derived from the industrial undertaking which will be eligible for grant of deduction u/s 80IA and the Assessing Officer committed an error in including the receipt in the eligible profit. Those facts are already on the record. It is to be seen, whether the receipt is of capital nature or of a revenue nature. Even in case the order of the CIT is upheld, then, in law, it will affect the computation of income, ultimately because the receipt will not be taxable, it will not come under the ambit of computation of income. Simultaneously it will be excluded from the deduction u/s 80IA as well as of the total income. The result will remain as it is. It is a revenue neutral case. Therefore, in view of the ratio laid down by the Hon'ble jurisdictional High Court in the case of Gopala Gowda (Supra), the second condition for taking action u/s 263 does not exist. The assessment order is not prejudicial to the interests of the Revenue. In view of the above discussion, we allow the appeal of the assessee and quash the impugned order of the learned CIT passed u/s 263 of the Income Tax Act."

The aforesaid shows that, so far as the question as to

whether, the income by sale of carbon credit could be termed as capital receipt or profit, is concerned, the Tribunal has considered the decision of the Hyderabad Bench and it has further taken note of the fact that decision of the Tribunal of Hyderabad Bench was carried before the Andhra Pradesh High Court and the said decision was not interfered with. The Tribunal, in its decision has also referred to the decision of the Apex Court with regard to power under Section 263 of the Income Tax Act, 1961 (hereinafter referred to as "the Act") of the revisional authority.

4. In our view, the principal question, which may arise is, as to whether by sale of carbon credit capital receipt is generated or a profit out of the business activity of the assessee. More or less, in a similar case, the Apex Court had an occasion to consider such an issue in the case of Commissioner of Income Tax v. Maheshwari Devi Jute Mills Ltd. [(1965) 57 ITR 36 (SC)], wherein the question came up for consideration before the Apex Court as to whether by sale of loom-hours, the amount received could be termed as capital receipt or the income out of business. In the said decision, the Apex Court held that the amount received out of sale of loom-hours can be termed as capital receipt and not income out of business.

5.Subsequently, in a later decision of the Apex Court,

a question came up for consideration in the case of M/s. Empire Jute Co. Ltd. v. Commissioner of Income Tax [(1980) 4 SCC 25] the question which arose before the Apex Court was, if loom-hours are purchased by the manufacturing mills, whether it can be termed as capital expenditure or revenue expenditure. In the said decision, the earlier decision of the Apex Court in the case of Maheswari Devi Jute Mills (supra) was also relied upon by the Revenue and after considering the same, the Apex Court at paragraph Nos. 4 and 5 observed thus:

"4. Now an expenditure incurred by an assessee can qualify for deduction under Section 10(2) (xv) only if it is incurred wholly and exclusively for the purpose of his business, but even if it fulfils this requirement, it is not enough; it must further be of revenue as distinguished from capital nature. Here in the present case it was not contended on behalf of the Revenue that the sum of Rs. 2,03,255 was not laid out wholly and exclusively for the purpose of the assessee's business but the only argument was and this argument found favour with the High Court, that it represented capital expenditure and was hence not deductible under Section 10(2) (xv). The sole question which therefore arises for determination in the appeal is whether the sum of Rs. 2,03,255 paid by the assessee

represented capital expenditure or revenue expenditure. We shall have to examine this question on principle but before we do so, we must refer to the decision of this Court in Maheshwari Devi Jute Mills case since that is the decision which weighed heavily with the High Court, in fact, compelled it to negative the claim of the assessee and hold the expenditure to be on capital account. That was a converse case where the question was whether an amount received by the assessee for sale of loom hours was in the nature of capital receipt or revenue receipt. The view taken by this Court was that it was in the nature of capital receipt and hence not taxable. It was contended on behalf of the Revenue, relying on this decision, that just as the amount realised for sale of loom hours was held to be capital receipt, so also the amount paid for purchase of loom hours must be held to be of capital nature. But this argument suffers from a double fallacy.

5. In the first place 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 prayer. It was felicitously

pointed out by Macnaghten, J. in Racecourse Betting Control Board v. Wildthat a "payment may be a revenue payment from the point of view of the payer and a capital payment from the point of view of the receiver and vice versa". Therefore, the decision in Maheshwari Devi Jute Mills case cannot be regarded as an authority for the proposition that payment made by an assessee for purchase of loom hours would be capital expenditure. Whether it is capital expenditure or revenue expenditure would have to be determined having regard to the nature of the transaction and other relevant factors." Thereafter, the Apex Court while considering the test to find out as to whether a particular expenditure can be termed as capital or revenue expenditure observed at paragraph Nos. 8 and 9 as under:

"8. The decided cases have, from time to time, evolved various tests for distinguishing between capital and revenue expenditure but no test is paramount or conclusive. There is no all embracing formula which can provide a ready solution to the problem; no touchstone has been devised. Every case has to be decided on its own facts keeping in mind the broad picture of the whole operation in respect of which the expenditure has been incurred. But a few tests formulated by the courts may be referred to as they might help to arrive at a correct decision of the controversy between the parties. One

celebrated test is that laid down by Lord Cave, L.C., in Atherion v. British Insulated and Halsby Cables Ltd. where the learned law Lord stated:

When an expenditure is made, not only once and for all, but with a view to bringing into existence an asset or an advantage for the enduring benefit of a trade, there is very good reason (in the absence of special circumstances leading to an opposite conclusion) for treating such an expenditure as properly attributable not to revenue but to capital.

This test, as the parenthetical clause shows, must yield where there are special circumstances leading to a contrary conclusion and, as pointed out by Lord Radcliffe in Commissioner of Taxes v. Nchanga Consolidated Copper Mines Ltd., it would be misleading to suppose that in all cases, securing a benefit for the business would be prima facie capital expenditure "so long as the benefit is not so 20/37 https://www.mhc.tn.gov.in/judis/ T.C.A.No.451 of 2018 transitory as to have no endurance at all". 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. But even if this test were applied in the present case, it does not yield a conclusion in favour of the Revenue. Here, by purchase of loom hours no new asset has been created. There is no addition to or expansion of the profit-making apparatus of the assessee. The income-earning machine remains what it was prior to the purchase of loom hours. The assessee is merely enabled to operate the profit-making structure for a longer number of hours. And this advantage is clearly not of an enduring nature. It is limited in its duration to six months and, moreover, the additional working hours per week transferred to the assessee have to be utilised during the week and cannot be carried forward to

the next week. It is, therefore, not possible to say that any advantage of enduring benefit in the capital field was acquired by the assessee in purchasing loom hours and the test of enduring benefit cannot help the Revenue. 9. Another test which is often applied is the one based on distinction between fixed and circulating capital. This test was applied by Lord Haldane in the leading case of John Smith & Son v. Moore where the learned law Lord drew the distinction between fixed capital and circulation capital in words which have almost acquired the status of a definition.

He said:

Fixed capital (is) what the owner turns to profit by keeping it in his own possession; circulating capital (is) what he makes profit of by parting with it and letting it change masters.

Now so long as the expenditure in question can be clearly referred to the acquisition of an asset which falls within one or the other of these two categories, such a test would be a critical one. But this test also sometimes break down because there are many forms of expenditure which do not fall easily within these two categories and not infrequently, as pointed out by Lord Radcliffe in Commissioner of Taxes v. Nchanga Consolidated Copper Mines Ltd., the line of demarcation is difficult to draw and

leads to subtle distinctions between profit that is made "out of" assets and profit that is made "upon" assets or "with" assets. Moreover, there may be cases where expenditure, though referable to or in connection with fixed capital, is nevertheless allowable as revenue expenditure. An illustrative example would be of expenditure incurred in preserving or maintaining capital assets. This test is therefore clearly not one of universal application. But even if we were to apply this test, it would not be possible to characterise the amount paid for purchase of loom hours as capital expenditure, because acquisition of additional loom hours does not add at all to the fixed capital of the assessee. The permanent structure of which the income is to be the produce or fruit remains the same; it is not enlarged. We are not sure whether loom hours can be regarded as part of circulating capital like labour, raw material, power etc., but it is clear beyond doubt that they are not part of fixed capital and hence even the application of this test does not compel the conclusion that the payment for purchase of loom hours was in the nature of capital expenditure."

After making the aforesaid observation, at paragraph No. 10, the Apex Court, on the basis of the facts of the said case concluded as under:

"Similarly, if payment has to be made for securing

additional power every week, such payment would also be part of the cost of operating the profit-making structure and hence in the nature of revenue expenditure, even though the effect of acquiring additional power would be to augment the productivity of the profit-making structure. On the same analogy payment made for purchase of loom hours which would enable the assessee to operate the profit-making structure for a longer number of hours than those permitted under the working time agreement would also be part of the cost of performing the income-earning operations and hence revenue in character."

Accordingly, the payment made for purchase of loom-hours by Jute Mill Company was held to be Revenue expenditure.

6. At this stage, we may also refer to the decision of the Andhra Pradesh High Court, which has been relied upon by the Tribunal in the impugned order. More or less, identical question was raised and the Andhra Pradesh High Court in the case of Commissioner of Income Tax-IV v. My Home Power Ltd. [(2014) 46 Taxmann.com 314 (Andhra Pradesh), at paragraph No. 3 observed thus:

"3. We have considered the aforesaid submission and we are unable to accept the same, as the learned Tribunal has factually found that "Carbon Credit is not an offshoot of

business but an offshoot of environmental concerns. No asset is generated in the course of business but it is generated due to environmental concerns.

"We agree with this factual analysis as the assessee is carrying on the business of power generation. The Carbon Credit is not even directly linked with power generation. On the sale of excess Carbon Credits the income was received and hence as correctly held by the Tribunal it is capital receipt and it cannot be business receipt or income. In the circumstances, we do not find any element of law in this appeal."

The aforesaid shows that the Andhra Pradesh High Court has confirmed the view of the Tribunal that Carbon Credit is not an offshoot of business, but an offshoot of environmental concerns. No asset is generated in the course of business, but it is generated due to environmental concerns. It was also found that the carbon credit is not even directly linked with the power generation and the income is received by sale of the excess carbon credits. It was found that the Tribunal has rightly held that it is capital receipt and not business income.

7. As such, in our view, when the issue is already covered by the decision of the Andhra Pradesh High Court, wherein the view taken by the Tribunal of Hyderabad Bench

has been followed in the present case, one may say that no substantial question of law would arise for consideration."

...

41.In the result, the tax case appeal is allowed to the extent indicated hereinbelow:-

(i) Substantial question of law nos.1 and 2 are left open and the issue with regard to the disallowance under Section 14A of the Act read with Rule 8D of the Rules is remanded to the Assessing Officer for fresh decision on merits and in accordance with law, after opportunity to the assessee;

(ii) Substantial question of law no.3 is not pressed by the assessee, as pursuant to the order of remand passed by the Tribunal, the Assessing Officer has allowed the relief to the assessee. Accordingly, this question is not required to be answered; and

(iii) For the reasons assigned in the preceding paragraphs, substantial question of law no.4 is answered in favour of the assessee. No costs."

4.On a reading of the judgment cited supra, it is clear that the question of law involved in the present appeal is covered by the said judgment. Hence, following the ratio laid down in the judgment dated

19.01.2021 made in T.C.A.No.451 of 2018, the question of law is decided against the Revenue and in favour of the assessee. Accordingly, the Tax Case Appeal is dismissed. No costs.

Index : Yes/No **[M.D., J.] [T.V.T.S., J.]**
Internet : Yes **08.03.2021**
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To

The Income Tax Appellate Tribunal, Chennai, "C" Bench

M.DURAISWAMY, J.
and

T.V.THAMILSELVI, J.

va

T.C.A.No.986 of 2013

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