



ITA NO. 246 OF 2019

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2024:KER:67340

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE DR. JUSTICE A.K.JAYASANKARAN NAMBIAR

&

THE HONOURABLE MR. JUSTICE SYAM KUMAR V.M.

THURSDAY, THE 5TH DAY OF SEPTEMBER 2024 / 14TH BHADRA, 1946

ITA NO. 246 OF 2019

(AGAINST THE ORDER DATED 01.03.2019 IN ITA NO.356 & 357/COCH/2017 AND C.O.NO.03/COCH/2018 (A.Y. 2008-09) OF THE INCOME TAX APPELLATE TRIBUNAL, COCHIN BENCH, COCHIN)

APPELLANT:

M/S.INDITRADE CAPITAL LIMITED
XXXVI-202, JJ COMPLEX, DAIRY METHANAM ROAD, EDAPPALLY,
KOCHI 682 024 REPRESENTED BY ITS AVP ACCOUNTS AND
AUTHORISED SIGNATORY BIJU S.

BY ADVS.
SRI.JOSE JACOB
SHRI.JAZIL DEV FERDINANTO

RESPONDENT:

COMMISSIONER OF INCOME TAX
WARD -1(1) IS PRESS ROAD, KOCHI 682 018

BY ADVS.
SRI.P.K.RAVINDRANATHA MENON (SR.)
SRI.JOSE JOSEPH, SC, FOR INCOME TAX

THIS INCOME TAX APPEAL HAVING BEEN FINALLY HEARD ON
05.09.2024, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:



JUDGMENT

Dr. A.K.Jayasankaran Nambiar, J.

The appellant before us is a listed company incorporated under the Companies Act, 1956, and primarily engaged in the business of brokers and securities trading in various stock exchanges and also acts as a depository participant. In this appeal, the order that is impugned is the common order No.03/Coch/2018 dated 01.03.2019 of the Income Tax Appellate Tribunal, Cochin Bench, pertaining to the assessment year 2008-2009 under the Income Tax Act. The substantial questions of law that have been raised by the appellant in this appeal are as follows:

“a. Whether on the facts and in the circumstances of the case, and in the law the Income Tax Appellate Tribunal was justified in disallowing the amount of expenditure incurred towards professional and consultancy charges totaling to Rs.75,70,000 by incorrectly treating the same as directly related to the expansion of capital base of the Company and hence capital in nature.

b. Whether on the facts and in the circumstances of the case, and in the law the Income Tax Appellate Tribunal has erred in treating the amount incurred towards professional and consultancy charges as capital expenditure without considering the fact that the consultancy charges paid by the Appellant does not result into any long term enduring benefit to the Appellant as the expenses were purely operational in nature and intended for the furtherance of the appellant's business and were incurred in the revenue field to identify suitable investors.

c. Whether on the facts and in the circumstances of the case, and in law the Income Tax Appellate Tribunal was justified in confirming the disallowance of payments towards employees'



contribution to PF and ESI before the due date of filing of the Return of Income without considering the provisions of Section 43B of the Income Tax Act which provides that the sum payable by the assessee as an employer by way of contribution to any provident fund or any other fund for the welfare of the employees shall be allowed as deduction if the same is actually paid before the due date of filing of return of income.

d. Whether on the facts and in the circumstances of the case, and in law the Income Tax Appellate Tribunal was justified in confirming the disallowance of the amount of revenue expenditure incurred in relation to initial Public Offer of shares amounting to Rs.23,55,499 claimed as deduction during the Financial Year 2007-08 (out of the total amount claimed of Rs.29,57,136) without considering the fact that the amount of Rs.23,55,499 represents expenses which are purely revenue in nature such as advertising, travelling, postage market research etc., the benefit of which is purely in the revenue field.

e. Whether on the facts and in the circumstances of the case, and in law the Income Tax Appellate Tribunal was justified in not allowing the claim of prior period expenditure amounting to Rs.1,78,48,292 without considering the fact that the Appellant was eligible to claim the said expenditure during AY 2008-09 and accordingly had filed revised return of income within the time limit prescribed under Section 139(5) of the Income Tax Act, which the appellant had omitted to claim in the original return of income.

f. Whether on the facts and in circumstances of the case, and in law the Income Tax Appellate Tribunal was justified in not allowing the claim of prior period expenditure amounting to Rs.1,78,48,292 without considering the fact that the same has already been offered to tax by the appellant in AY 2009-10 and it would be against the canons of taxation to impose a tax liability on the same amount twice.”

2. At the outset, it is submitted by the learned counsel Sri. Jose Jacob appearing on behalf of the appellant that of the aforementioned questions of law that have been raised in the appeal, Question No. (c) is already covered against the appellant by the decision reported in **CIT v. Merchem Ltd. [(2015) 378 ITR 443 (ker)]**. Taking note of the said decision, the said question is therefore answered against the assessee and



in favour of the revenue. It is also the submission of the learned counsel that Questions (e) and (f) pertaining to the disallowance of prior period expenses, have been remanded to the assessing authority by the Appellate Tribunal, and in the proceedings that ensued, the assessing authority has allowed the claim of the appellant. Taking note of the said development, we find that the Questions (e) and (f) do not now arise for consideration in this appeal. What remains for consideration are Questions (a), (b), and (d) listed above, which pertain to (i) disallowance of revenue expenditure incurred in relation to professional and consultancy charges totaling to an amount of Rs.75,70,000/- in relation to identifying suitable private equity investors, and (ii) disallowance of expenditure incurred in relation to initial public offer of shares amounting to Rs.23,55,499/- claimed as deduction during the financial year 2007-2008 such as advertising, traveling, postage, market research, etc.

3. With regard to the disallowance of expenditure incurred in relation to professional and consultancy charges, it was the finding of the assessing authority as also the First Appellate Authority and the Appellate Tribunal that the appellant assessee had entered into an agreement with M/s.Veda Corporate Advisors Pvt. Ltd. for various services provided by the latter. The services include (a) preparation of Executive Summary/presentation for initial circulation among interested investors and coordination amongst investors, (b) preparation of investor presentation and information memorandum, (c) handling negotiations with



investors, (d) advising on business valuation, (e) co-ordination of assistance in negotiations with the investors to reach an initial memorandum of understanding, (f) coordinating due diligence with audit firms, and (g) signing of the final definitive shareholder agreements.

4. It was also noticed that as a result of the exercise undertaken by the appellant assessee the investor M/s. Duckworth Limited invested in the appellant company as Equity of Rs.49.83 crores in share capital and convertible warrants of Rs.6.4 crores approximately, thereby enhancing the capital funds of the appellant company from Rs.24 crores to Rs.80.5 crores. The authorities below therefore found that inasmuch as the consultancy fee expended was for obtaining long-term benefits for the company the expenditure could not be treated as revenue expenditure as claimed by the appellant but had to be treated as non-depreciable capital expenditure that was incurred for enhancing the capital capital base of the appellant company and thereby providing enduring benefits in terms of capital to the appellant company.

5. As regards the claim of expenditure incurred in relation to IPO of shares, the authority below found that Section 35D of the Income Tax Act clearly provided for the expenditure that could be claimed as a deduction when incurred for the purposes of obtaining a capital asset. The indication in Section 35D, that the expenses incurred in connection with IPO was a capital expenditure, was contained in Section 35D(2)(c)(iv),



which provided for amortization of expenditure in connection with the issue, for public subscription of shares in or debentures of the company, being underwriting commission, brokerage and charges for drafting, typing, printing and advertisement of the prospectus over a period of five years. The authority below therefore found that inasmuch as the expenses incurred by the appellant company were towards acquiring an asset of a capital nature, and the provisions of Section 35D permitted deduction of only certain expenses that were directly incurred in connection with the acquisition of an asset of capital nature, the other expenses that were incurred in that connection, namely, the indirect expenses, could not be separately claimed as revenue expense. According to the authority below, there was no justification or warrant for creating an artificial distinction between direct and indirect expenses in relation to expenses that were admittedly capital in nature, solely for the purposes of claiming a deduction under the Income Tax Act.

6. Before us, it is the submission of Sri. Jose Jacob, the learned counsel for the appellant relying on the decisions in **Brooke Bond India Ltd. v. Commissioner of Income-tax [(1997) 225 ITR 798 (SC)]**, **Principal Commissioner of Income-tax v. Sintex Industries Ltd. [(2017) 82 taxmann.com 428 (Gujarat)]**, **Principal Commissioner of Income-tax v. Rajasthan State Beverages Corporation Ltd. [(2017) 84 taxmann.com 185 (SC)]** arising out of the order of the High Court of Rajasthan in case of **Principal Commissioner of Income-tax v.**



Rajasthan State Beverages Corporation Ltd. [(2017) 84 taxmann.com 173 (Rajasthan)], Commissioner of Income-tax v. Ashok Leyland Ltd. [(2012) 23 taxmann.com 50 (Madras)], Commissioner of Income-tax v. Kreon Financial Services Ltd. [(2013) 38 taxmann.com 46 (Madras)], and Commissioner of Income-tax v. Indo Nissin Foods Ltd. [(2013) 35 taxmann.com 637 (Karnataka)], that when it comes to claiming deduction in respect of consultancy fees, we ought to make a distinction between consultancy fees that have a proximate nexus with the acquisition of a capital asset or capital receipt, and those that do not. He points out that in the instant case, there was only a remote connection between the expense incurred for obtaining advice of the consultant, and the actual acquisition of a capital receipt/asset, and hence the claim for expenses had to be allowed by treating the same as revenue expenditure. He further seeks to distinguish the judgment of the Supreme Court in **Brooke Bond India Ltd. v. Commissioner of Income-tax [(1997) 225 ITR 798 (SC)]** by contending that in the said case the expenses incurred by the assessee bore a proximate nexus with the acquisition of the capital asset/receipt.

7. As regards the expenses incurred in connection with the IPO, his contention is that even if Section 35D of the Income Tax Act did not permit an indirect expenditure to be claimed as a deduction when incurred in connection with the IPO, the said expenditure could always be claimed as a revenue expenditure under the provisions of the Income Tax



Act. He submits therefore that the lower authority erred in denying him the benefit of the said deduction. In support of his contention, he places reliance on the decision of the Supreme Court in **Madras Industrial Investment Corporation Limited v. Commissioner of Income-tax [(1997) 91 Taxman 340 (SC)]**.

8. Per contra, it is the submission of Sri. Jose Joseph, the learned Standing counsel for the Income Tax Department that the impugned order of the Appellate Tribunal does not require any modification since it has relied on the settled law on the subject as espoused by the various decisions of the Supreme Court that are referred to therein. With particular reference to the nature of the services provided by the consultant, the payment to whom was claimed as a revenue expenditure by the appellant, he would point out that a perusal of the nature of the services provided by the consultant clearly reveals that the expenses were incurred for the provision of services that were to be of enduring nature insofar as the appellant assessee was concerned. It is his submission that nothing more needed to be established for holding that the expenses incurred by the appellant were in fact capital in nature, and therefore, to be disallowed as a revenue expenditure.

9. We have considered the rival submissions, and after perusing the pleadings before us and the decisions cited by the learned counsel, we are of the view that Question Nos. (a), (b), and (d) have to be answered



against the assessee and in favour of the revenue. In so far as the claim for deduction of consultancy fee is concerned, we find from the nature of the services that were provided by the consultant that the expenses were incurred in connection with obtaining benefits that were of an enduring nature. The findings of the Assessing Authority, the First Appellate Authority, and the Appellate Tribunal, relying, *inter alia*, on the decision of the Supreme Court in **Brooke Bond India Ltd. (Supra)** and **Punjab State Industrial Development Corporation Ltd v. Commissioner of Income-tax [(1997) 225 ITR 792 (SC)]**, therefore do not require any intervention. Similarly, the claim for deduction of IPO related expenses, also cannot be legally countenanced. We find ourselves unable to accept the submission of the learned counsel for the appellant that an artificial distinction can be made between direct and indirect expenses incurred in connection with the IPO, and that although Section 35D permits only the deduction of direct expenses, the indirect expenses must nevertheless be permitted as a deduction under Section 37 of the Income Tax Act. In our view, there is no distinction to be made between direct and indirect expenses that are eligible for deduction under Section 35 D of the Income Tax Act. As is trite, the taxation of a capital receipt is itself by way of an exception to the general principle that under an income tax legislation what is normally brought to tax is only a revenue receipt. In the same vein, what is permissible as a deduction in any particular year is only a revenue expenditure incurred by an assessee or such capital expenditure as is expressly permitted by the statute. On the facts of the instant case,



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we find that Section 35D permits only certain capital expenses as deductible and not others. Thus, once it is an admitted fact that the appellant has already been granted the benefit of deduction of direct expenses incurred in connection with the IPO, he cannot claim deduction of the indirect expenses incurred in connection with the same object as revenue expense because his classification of the expense as direct or indirect does not really alter the nature of the expense itself which continues to remain a capital expense. We are thus of the view that the impugned order of the Appellate Tribunal does not require any modification.

10. We thus dispose this IT Appeal by answering Question Nos. (a), (b), (c) and (d) against the assessee and in favour of the revenue. Question Nos. (e) and (f) are not answered since they do not now arise for consideration in the instant case.

Sd/-

**DR. A.K.JAYASANKARAN NAMBIAR
JUDGE**

Sd/-

**SYAM KUMAR V.M.
JUDGE**

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APPENDIX OF ITA 246/2019

PETITIONER ANNEXURES

- ANNEXURE A TRUE COPY OF THE REVISED COMPUTATION OF TOTAL INCOME ALONG WITH THE REVISED INCOME TAX RETURN ACKNOWLEDGEMENT FOR AY 2008-09 DATED 31.03.2010
- ANNEXURE B TRUE COPY OF THE ASSESSMENT ORDER ISSUED BY THE ADDL. COMMISSIONER OF INCOME TAX, RANGE-1, KOCHI FOR THE AY 2008-09 DATED 07.12.2010
- ANNEXURE C TRUE COPY OF THE APPEAL DOCUMENTS FILED WITH THE CIT(A) FOR AY 2008-09 DATED 05.01.2011
- ANNEXURE D TRUE COPY OF THE CIT(A) ORDER ISSUED BY THE FOR THE AY 2008-09 DATED 18.05.2017
- ANNEXURE E TRUE COPY OF THE APPEAL DOCUMENTS FILED BY THE APPELLANT IN ITA NO. 357/COCH/2017 DATED 24.07.2017
- ANNEXURE F TRUE COPY OF THE APPEAL DOCUMENTS FILED BY THE ASSESSING OFFICER IN I.T.A N. 356/COCH/2017 DATED 17.07.2017
- ANNEXURE G TRUE COPY OF THE CROSS OBJECTION FILED BY THE APPELLANT IN CO NO. 03/COCH/2018 DATED 09.03.2018
- ANNEXURE H THE CERTIFIED COPY OF THE ITAT ORDER ISSUED BY THE INCOME TAX APPELLATE TRIBUNAL COCHIN BENCH, COCHIN FOR AY 2008-09 DATED 01.03.2019
- ANNEXURE I TRUE COPY OF FORM 3CA-3CD OF AY 2009-10 DATED 18.09.2009
- ANNEXURE J TRUE COPY OF COMPUTATION OF TOTAL INCOME OF AY 2009-10 DATED 14.03.2011