courtkutchehry.com

Company: Sol Infotech Pvt. Ltd.

Website: www.courtkutchehry.com

Printed For:

Date: 18/10/2025

Commissioner of Income Tax Vs Noida Toll Bridge Co. Ltd.

IT Appeal No. 44 of 2010

Court: Allahabad High Court

Date of Decision: Aug. 24, 2012

Acts Referred:
Income Tax Act, 1961 â€" Section 10(2)(xv), 143(1), 143(2), 260A, 271(1)(c)

Citation: (2013) 255 CTR 80

Hon'ble Judges: Sunil Ambwani, J; Aditya Nath Mittal, J

Bench: Division Bench

Advocate: Dhananjay Awasthi, for the Appellant; S.R. Patnaik, Ms. Akansha Agarwal and Ashish Agrawal, for the Respondent

Final Decision: Dismissed

Judgement

1. We have heard Shri Dhananjay Awasthi, learned counsel appearing for the appellant. Shri S.R. Patnaik, Ms. Akansha Agarwal and Shri Ashish

Agrawal appear for the respondent-assessee. The CIT, Ghaziabad has filed this income tax appeal under s. 260A of the IT Act, 1961 against the

judgment and order dt. 20th April, 2009 passed by Tribunal, Delhi Bench "E", New Delhi in ITA Nos. 1683 and 2864/Del/2006 for asst. yr.

2002-03 on the questions of law for consideration by this Court:

(1) Whether the Hon"ble Tribunal is justified in holding that the amount of expense of Rs. 1,18,01,923 incurred on account of take out assistance

fee as revenue expenditure when the same is related to fixed capital of the assessee?

(2) Whether the Tribunal correctly interpreted the language of s. 37(1) in deleting the addition made by the AO?

2. The assessee-company is engaged in the business of development to establish, construct, operate and maintain a bridge across the river Yamuna

connecting Delhi and Noida under the ""build-own-operate-transfer"" (BOOT) basis. The Delhi-Noida Link Bridge comprises and includes

adjoining roads and other related facilities and the Ashram Flyover which has been constructed at the landfall of the Delhi-Noida Link Bridge.

3. A return declaring a loss of Rs. 73,33,64,020 was filed by respondent-assessee on 30th Oct., 2002. It was processed under s. 143(1) on 25th

Feb., 2003. The case was considered for scrutiny by issuing notice under s. 143(2) of the IT Act, 1961 (the Act) dt. 29th Oct., 2003. The notice

along with a questionnaire was issued to the assessee on 2nd Dec, 2004, in response to which the chartered accountant of the assessee attended

the proceedings and filed necessary details.

4. The respondent-assessee claimed the finance charges of an amount of Rs. 1,06,26,975 in the P & L a/c, as a part of other finances. The

assessee was asked to give details of these charges claimed as ""take out assistance charges"". The assessee explained that it has issued deep

discount bond (DDB) for financing the DND project. The DDBs were issued by the company at a face value of Rs. 5,000 each for a total of Rs.

50 crores maturing at the end of 15 years from the date of its allotment. The DDB holders were given an option under the offer to redeem the

bonds in the 5th or 9th year of its allotment. In this respect the company entered into a take out assistance agreement with M/s. Infrastructure

Leasing & Finance Services Ltd. (IL&FS) and M/s. Infrastructure Development Finance Co. Ltd. (IDFC). As per the terms of the agreement,

IL&FS and IDFC guaranteed for purchase of DDB from the DDB holders, pursuant to exercise of redemption option. The assessee-company

was required to pay the take out assistance charges to IL&FS and IDFC @ 1.6 per cent per annum of cumulative value of DDB as per the terms

of the agreement.

5. The Dy. CIT, Circle-13(1), GUJARAT MINERAL DEVELOPMENT CORPORATION LTD. Vs. COMMISSIONER OF Income Tax,

GUJARAT., in which it was held that where expenditure is incurred in the field of fixed capital, it is on capital account but if it is in the field of

circulating capital, it is revenue account. The taxing officer also relied upon Indian Ginning and Pressing Co. Ltd. Vs. Commissioner of Income

Tax, in which it was held that in relation to the capital of enduring benefit, what is material is to consider 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. If the advantage consists

merely in facilitating the assesee"s trading operations, or enabling the management and conduct of the 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 period. The AO held that it is clear that the nature of payment under consideration, is capital in nature, and consequently added back

the amount paid by the assessee-company, as "take out assistance fee", in the income of the assessee as disallowable expense and also directed

penalty proceedings under s. 271(1)(c) to be initiated separately.

6. The CIT(A)-XIV, New Delhi in appeal held that the fee is being paid for redemption of bonds and is directly related to the fixed capital of the

appellant. The capital is altered every time a bond is redeemed and consequently the expense of take out assistance fee is directly linked to the

transaction.

7. The Tribunal, Delhi Bench "E" decided this question in favour of the assessee and against the Revenue. The reasoning given by the Tribunal in

paras 7 and 8 is quoted as below:

7. We have heard both the parties. We have also examined facts and circumstances of the case. There is no dispute that assessee obtained the

loan by issuing DDBs. The loan obtained and expenditure incurred for obtaining such loan or the interest paid thereon are revenue deductions, as

loan can by no means be held to be an asset. This was authoritatively laid down by their Lordships of Supreme Court in the case of India Cement

Ltd. (supra). The above decision has all along been followed and applied and there can be no dispute on this legal position. The assessee, in order

to make obtaining of loan easier, gave option to the bond holders to redeem bond on completion of 5th and 9th years of the bond period.

However, not being sure of the financial position, it entered into agreements with the two financial institutions to ensure that there is no default in the

payment of redemption amount in cases where option of redemption is exercised by the bond holders. The financial institutions as per the

agreement, are to charge take out assistance fees @ 1.6 per cent per annum of amount of take out obligations.

8. Now above agreements have been entered into by the assessee as a prudent business measure to avoid default on the part of the assessee. The

agreement was entered into in the course of the business and for the purposes of the assesee"s business. The Revenue authorities have made and

upheld the disallowance in question merely by holding that take out assistance fee paid is an expenditure in capital field. In the payment, the

assessee has acquired some enduring benefit. However, what is enduring benefit is not elaborated in the impugned orders. What capital asset the

assessee has acquired by entering into the agreement with financial institution is not shown on record. Having found no answer from the assessment

or appellate orders. We had put the question to the learned Departmental Representative appearing for the Revenue. He fairly conceded that by

entering into agreement, no asset has been acquired by the assessee. DDBs were issued and loans were obtained. The original loan or its

replacement by another loan, by no stretch of imagination, can be treated to be a capital asset or an enduring benefit. This has been authoritatively

held in India Cements Ltd. (supra). The assessee has an obligation to repay the loan by discharging or redeeming DDBs. In case payment is made

by financial institutions, the obligation of the assessee is shifted from bondholders to the financial institutions in addition to payment of fee to the

institutions. Thus, instead of an advantage, burden of the assessee is increased on account of agreements necessitated by circumstances. There is

no case of enduring advantage or advantage in capital field. No capital asset can be said to be acquired by the assessee in the payment of take out

assistance fee. Two decisions referred to by the AO have no application in this case as those cases pertain to payment of computation fees and

repair and maintenance of building. Cited cases do not pertain to discharge of obligation relating to payment of loan. The case of the assessee is

covered by the decision of Hon''ble Bombay High Court in the case of Kinetic Engineering Ltd. Vs. Commissioner of Income Tax, which has

followed India Cement Ltd. (supra) and several other decisions on the issue. Relevant extract of the above decision has already been noted.

8. It is submitted by Shri Dhananjay Awasthi appearing for the Revenue that the reasoning given by the Tribunal is not sustainable as it has not

examined the fact that every time the bond is released, the capital of the assessee is altered, hence the expense of taking out assistance fee is

capital in nature. The reasoning that loans cannot be of an asset is subjective. The expense incurred in servicing and maintaining the loan is directly

related to the capital and gives enduring benefit for indefinite future. He relies on Gujarat Mineral Development Corporation Ltd. vs. CIT (supra)

and Indian Ginning & Pressing Co. Ltd. vs. CIT (supra), to support the argument.

9. In Gujarat Development Corporation Ltd. (supra), the Gujarat High Court held that if an expenditure is incurred to ward off competition with a

view to deriving an advantage of an enduring nature, the expenditure incurred is on capital account and not on revenue account; so also, if an

expenditure is incurred with a view to acquire capital asset, it is on capital account regardless of the fact whether the capital asset is ultimately

acquired or not. In Indian Ginning & Pressing Co. Ltd. (supra), the Gujarat High Court held that in determining whether an expenditure is of capital

or revenue nature what is material is to consider 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. If the advantage consists merely in facilitating the assesee''s trading operations or enabling

the management and conduct of the assesee''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. By enduring, what is

meant is enduring in the way that fixed capital endures and it does not connote a benefit that endures in a sense that for a good number of years, it

relieves the assessee of revenue payment or disadvantage. The words ""permanent"" and ""enduring"" are only relative terms and not synonymous with

perpetual or everlasting. In this case an amount claimed towards repairs of building used as a cherish for children of female employees. It was

converted for use as administrative offices. The High Court held that the assessee had incurred expenses, which were both at the point of time i.e.,

before and after expenditure was incurred related to the business of the assessee. There was no addition to or expansion of the profit making

apparatus of the assessee. The expenditure was deductible as revenue expenditure.

10. Learned counsel appearing for the assessee submits, supporting the judgment of the Tribunal, that the point and issue are squarely covered by

the judgment of Supreme Court in India Cements Ltd. Vs. Commissioner of Income Tax, Madras, which has been followed in Kinetic Engineering

Ltd. Vs. Commissioner of Income Tax, . In India Cements Ltd. (supra) the Supreme Court held that the nature of the expenditure incurred in

raising a loan would depend upon the nature and purpose of the loan. A loan may be intended to be used for the purchase of the raw material

when it is negotiated, but the company may after taking the loan changes its mind and spends it on securing capital assets. The purpose, for which

the new loan was required, was irrelevant to the consideration of the question whether the expenditure for obtaining the loan was revenue

expenditure or the capital expenditure. The expression ""for the purpose of the business"" in s. 10(2)(xv) is wider in scope than the expression ""for

the purpose of earning profits"". Its range is wide. It may take in not only the day to day running of a business but also the rationalisation of its

administration and modernization of its machinery. It may include measures for the preservation of the business and for the protection of its assets

and property from expropriation, coercive process or assertion of hostile title. It may also comprehend payment of statutory dues and taxes as a

precondition to commence or for carrying on of a business. It may comprehend many other acts incidental to the carrying on of business.

11. The Supreme Court in India Cements Ltd. (supra) relied on the reasoning in Dharamvir Dhir Vs. The Commissioner of Income Tax, Bihar and

Orissa, , in which it was held that the payment of interest and a sum equivalent to 11/16th of the profits of the business of the assessee in pursuance

to an agreement for obtaining loan from the lender were in a commercial sense expenditure wholly and exclusively laid out for the purpose of the

assesee''s business and they were, therefore, deductible revenue expenditure.

12. In Kinetic Engineering Ltd. (supra) the Bombay High Court distinguished the judgments of the Supreme Court in Challapalli Sugar Ltd. Vs.

The Commissioner of Income Tax, A.P., Hyderabad, and Commissioner of Income Tax, Gujarat Vs. Vallabh Glass Works Ltd., and held in a

case which is similar to the present case and in which the assessee had paid guarantee commission to the bankers, who issued guarantees on behalf

of the assessee-company favouring IDBI/ICICI for securing timely repayment of the deferred credit obtained by it under the bills discounting

scheme for the purpose of buying machinery in the running business as follows:

In the instant case, the uncontroverted factual position is that at the time the loan was raised, the assessee was a running concern. The guarantee

commission was payable to the bankers who issued guarantee on behalf of the assessee for securing timely repayment of the loan. The act of

borrowing money was incidental to the carrying on of the business and the loan obtained was not an asset or an advantage of enduring nature. In

fact, the loan was a liability which cannot be considered as an asset or an advantage of enduring nature. The fact that the loan was obtained for

purchasing a capital asset would not affect this position. In fact, that is not a relevant consideration. In that view of the matter the ratio of the

decision of the Supreme Court in India Cements Ltd. (supra) clearly applies and guarantee commission in the instant case has to be treated as a

revenue expenditure.

We have also perused the decisions of the High Courts of Andhra Pradesh, Madras, Karnataka and Calcutta referred to above. The Andhra

Pradesh High Court, in Addl. CIT vs. Akkamba Textiles Ltd. (supra) has held that the guarantee commission paid by the assessee in connection

with the purchase of machinery was a revenue expenditure and not a capital expenditure. While arriving at this conclusion, the High Court followed

the decision of the Supreme Court in India Cements Ltd. (supra). In Sivakami Mills Ltd. vs. CIT (supra), the Madras High Court also held that

guarantee commission paid to a bank for obtaining a loan for acquisition of machinery was a revenue expenditure. While saying so, the High Court

summed up the reasoning in support of its conclusion as follows:

The expenditure incurred for the purchase of the machinery was undoubtedly capital expenditure, for it brought in an asset of enduring advantage.

But the guarantee commission stands on a different footing. By itself, it does not bring into existence any asset of an enduring nature nor did it bring

in any other advantage of an enduring benefit. The acquisition of the machinery on installment terms was only a business exigency. If interest paid

on a credit purchase of machinery could be held to be revenue expenditure, we fail to see how guarantee commission paid to a bank for obtaining

easy terms for acquisition of the machinery could be regarded as capital payments.

12. To the same effect is the decision of the Karnataka High Court in CIT vs. Gogte Minerals (supra). In that case also, the assessee purchased

machinery on deferred payment scheme. The controversy was whether the guarantee commission paid by the assessee for securing the loan facility

was a revenue expenditure. It was observed:

In the present case, the assessee purchased machinery on deferred payment scheme. Payments made under the scheme should certainly be treated

as capital in nature. The guarantee agreement has been entered into not for the purpose of acquiring the asset as such, but for securing a loan

facility to pay the amount on deferred payment basis. Such an arrangement would only be a financial arrangement entered into by the assessee and

if any commission had been paid towards the guarantee arising thereto, it would be revenue in nature because in the course of conduct of business

such financial arrangement had been entered into.

We have also perused the decision of the Gujarat High Court in CIT vs. Vallabh Glass Works Ltd. (supra) wherein it was held:

... the payment of bank guarantee commission to the bank and the expenditure incurred in obtaining the letter of credit were necessary items of

expenditure to bring the machineries, capital assets, into existence and to put them in working condition. These items of expenditure were incurred

as an integral part of the payment of the cost price of the machineries and formed part of the cost of acquisition of the capital assets. Therefore, the

expenditure must be regarded as capital expenditure irrespective of the time when the payment was made.

We have carefully considered the above conclusion. However, in view of the clear decision of the Supreme Court in India Cements Ltd. (supra),

we find it difficult to agree with the reasoning and conclusion of the Gujarat High Court in the above decision.

In the light of the foregoing discussion, we are of the clear opinion that the bank guarantee commission paid by the assessee for securing timely

repayment of the deferred credit facility for buying machinery in its running business is a revenue expenditure and not a capital expenditure. The

Tribunal, in our opinion, committed a manifest error of law in holding it to be a capital expenditure. We accordingly answer the question referred to

us in the negative, i.e., in favour of the assessee and against the Revenue.

13. In the present case, we do not find that any of the tests laid down by the Supreme Court in India Cements Ltd. vs. CIT (supra) arc absent to

treat the expenses as capital expense. The "take out assistance fees" computed @ 1.6 per cent per annum of the respective amount to take out

obligation of both the entities were by way of guarantees on an exit option, independent of the financial position of the assessee company. The fees

cover the event, in which the assessee-company may not have sufficient cash flow at the time of premature redemption of the DDBs after the end

of the 5th and 9th year respectively at a pre-determined price. The guarantee fee was by way of assistance from financial institution; it was not an

asset or advantage of an enduring nature. The expenditure was made for securing the DDBs, in the event the subscribers exercise their option of

premature redemption at the end of 5th and 9th year, under the conditions of the bond. The Tribunal is correct in observing, relying upon Nagpur

Electric Light & Power Co. Ltd. vs. CIT 6 ITC 28, that the purpose for loan is irrelevant. It is the advantage of obtaining the guarantee which was

relevant.

14. We are of the opinion, that the question is covered by the judgment in India Cements Ltd. vs. CIT (supra). In CIT vs. Kinetic Engineering Ltd.

(supra) the Bombay High Court considered almost the same question and held that the bank guarantee commission paid by the assessee for

securing timely repayment of the deferred credit facilities for buying machinery for its running business is a revenue expenditure and not capital

expenditure.

15. The Tribunal in our opinion did not commit any error of law in holding that the take out assistance fee paid by the assessee-company to IL&FS

and IDFC was revenue expense. Both questions are thus decided in favour of the assessee and against the Revenue. The income tax appeal is

dismissed.