आयकर अपीलीय अधिकरण, मुंबई "डी" खंडपीठ

Income-tax Appellate Tribunal "D"Bench Mumbai

सर्वश्री राजेन्द्र, लेखा सदस्य एवं सी. एन. प्रसाद, न्यायिक सदस्य

Before S/Sh. Rajendra, Accountant Member & C. N. Prasad, Judicial Member

आयकर अपील सं./I.T.A./6704/Mum/2016, निर्धारण वर्ष /Assessment Year: 2012-13

Dy. CIT 9(3)(1) 215, 2nd Floor, Aayakar Bhavan Mumbai - 400020	Vs.	M/s. Dodson Lindblom Hydro Power Pvt. Ltd. 6-Shiv Vastu, Tejpal Scheme Road No.5, Vile Parle (E),Mumbai - 400057 **PAN:AAACD7612A**

(अपीलार्थी **/Appellant**) (प्रत्यर्थी **/ Respondent**)

Revenue by: Shri Ram Tiwari-DR

Assessee by: Shri Pankaj K. Jain-AR

सुनवाई की तारीख **/ Date of Hearing: 12/06/2018**

घोषणा की तारीख **/ Date of Pronouncement: 12/06/2018**

आयकर अधिनियम,1961 की धारा 254(1)के अन्तर्गत आदेश

Order u/s.254(1)of the Income-tax Act,1961(Act)

लेखा सदस्य,राजेन्द्र के अनुसार /PER RAJENDRA, AM-

Challenging the order dated 24.08.2016 of CIT(A)-16, Mumbai,the Assessing Officer (AO) has filed the present appeal. Assessee-company,engaged in the business of generation of hydro electric power, filed its return of income on 21.09.2012, declaring total income at Rs.2.57 crore, later on a revised return was filed on 19.08.2013 declaring income at Rs.1.96 crores.On 25.09. 2013,the assessee revised the return for the second time disclosing income of Rs.3.57 cores. The AO completed the assessment on 28.02.2015,u/s.143(3) of the Act,determining its income at Rs. 5.53 crores.

2.First effective ground of appeal is about deleting the addition made on account of interest expenditure of Rs.6.09 crores.During the assessment proceedings the AO found that assessee has advanced share application money to M/s.Ascent Hydro Project Ltd. He directed the assessee to explain as to why interest expenses amounting to Rs.11.68 cores should not be disallowed. After considering the submission of the assessee,dated 23.02.2015,he observed that interest expendi - ture,incurred by the assessee, had increased during the year under consideration, that there was corresponding increase in long term and short borrowings, that it had classified the application money under the head loans and advances,that the borrowed funds carried the interest rate of 11. 85%,tat the assessee had advanced the money as share application subscription for equity shares,

that it had utilised borrowed as well as own funds for making the investment of Rs.39.87 crores, that it had diverted its borrowed fund,that interest expenditure,u/s.36(1)(iii)had to be disallowed. Finally proportioned interest of Rs.2,00,32,397/- was disallowed.

3.Aggrieved by the order of the AO,the assessee filed an appeal before the First appellate Authority(FAA)and made detailed submissions.It also relied upon certain case laws.After considering the fund flow chart,details of loan availed by the assessee,he held that no borrowed funds were diverted in the investment as share application money in case of M/s.Asent Hydro Project Ltd. (AHPL),that the borrowed funds were utilised for the purpose for which they were sanctioned by the financial institutions, that those institutions were conducting audits from time to time to ensure that borrowed funds were utilised as per the terms and conditions agreed between them and the assessee, that the owned funds of the company (Rs.48.98 croes) were more than the advances(6.09 cores) given to AHPL, that the assessee utilised its own funds. Following the judgment of Hon'ble Bombay High Court in the case of Reliance Utilities(313 ITR 340)he deleted the addition made by the AO.

4.During the course of hearing before us,the Departmental Representative (DR) argued that assessee had invested money for subscribing the debentures,that it had diverted the borrowed funds for making investment,that the AO had rightly made the addition.The Authorized Representative(AR)stated that the assessee had sufficient own funds,that no borrowed funds were utilised for making investment,that the AO had totaled up the advances made for the earlier years also for making the disallowance,that the substantial portion of loan were sanction in the year 2006-07,that the advances to AHPL were made for A.Y.2008-09 onwards, that no disallow - ance was made by the AO in any of the preceding assessment years, when the advances were made to AHPL,that the loans sanctioned by various institutions were for specific purposes that the amount was utilised for those purposes only,that the own funds for the year under consideration amounted to Rs.48,98,36,261/-,that the amount to AHPL is for the purpose of business, that the provisions of section 36(1) were not applicable,that interest on amounts borrowed qualified for reduction. He relied upon the cases of Reliance Utilities supra, SA Builders (158 taxman 74),Kejriwal Enterprises (260 ITR 341) and Modi Private Ltd.(208 ITR 31).

5.We have heard the rival submissions and perused the material before us.We find that the assessee had advanced loan to AHPL for its business, that the financial institutions had advanced loans for a specific purpose, that the borrowed funds were utilised for those purposes only.It appears that the AO had not understood the real character of the loans availed by the assessee. He had not also considered overall availability of the loans sanctioned by the financial institutions.The FAA had given a finding of fact that borrowed funds were not utilised for the specific purposes and that the assessee had used its own funds for making investments. The available funds with it were in excess of the investments.Considering these facts, we are of the opinion that there is no need to interfere with the order of the FAA. So, confirming his order we decide the first effective ground of appeal against the AO.

6.Second effective ground of appeal is about sale of Carbon Credits.It was agreed by the representatives of both the sides that the issue stands decided by the Tribunal in the appeal No.5932/Mum/2010 and others dated 13.01.2016.We are reproducing paragraph no.3-7 of said order:-

> *"3. At the outset, Ld Counsel for the assessee submitted that the issue contested both by the assessee and the Revenue relates to the allowability of claim of deduction u/s.80IA of the Act in respect of the receipts earned by the assessee on sale of 'carbon credits'. Referring to the impugned order of the CIT(A), Ld Counsel for the assessee submitted that the assessee earned revenue from the sale of Carbon Emission Reductions (CERs) amounting to Rs.6,73,46,337/-. Assessee claimed deduction in this regard u/s.80IA of the Act in respect of these receipts as these receipts are the integral part of the power generation project. CIT(A) granted the deduction relying on the judgment of the Hon'ble Supreme Court in the case of Liberty India Vs. CIT (317 ITR 218). While grating deduction, CIT(A) held that the carbon credits is a by product of generation of hydro electric power and the same is eligible for deduction u/s.80IA(4) of the Act. The contents of para 1.5 of the CIT(A)'s order are relevant in this regard. On these facts, both the parties brought our attention to the judgment of the Hon'ble High Court of Andra Pradesh in the case of CIT vs. My Home Power Ltd. [2014] 365 ITR 82 (AP) and mentioned that the income derived from the sale of carbon credits is considered as a 'capital receipt' and not 'business receipt' and the same is not liable for tax under the Act. To that extent, as per the law standing today, the receipts on sale of the carbon credits fall in the capital zone.*
>
> *4. On the other hand, Ld DR for the Revenue relied on the decision of the Cochin Bench of the Tribunal in the case of Appollo Tyres Ltd. vs. ACIT [2014] 149 ITD 756, wherein a contrary view was taken by the ITAT. Referring to this decision, Ld Counsel for the assessee mentioned that the said decision was considered by the Chennai Bench of the Tribunal in the case of Arun Textile (P) Ltd. vs. ACIT (2014) 36 ITR (Tribunal) 300 and held that the receipts on sale of carbon credits are capital in nature. In the process, the Chennai Bench relied on the judgment of the Hon'ble High Court of Andhra Pradesh in the case of My Home Power Ltd. (supra). Thus, such receipts are now outside the scope of income chargeable to tax. In view of this, the order of the CIT(A) is required to be reversed to that extent.*

5. We have heard both the parties and perused the order of the Revenue Authorities as well as the decision cited before us on the issue relating to the chargeability of receipts on sale of carbon credits. In this regard, we have perused the said judgment of the Hon'ble High Court of Andhra Pradesh in the case of My Home Power Ltd (supra) and the sake of completeness of this order, held portion of the said judgment is extracted as under:

"ITAT have considered the aforesaid submission and ITAT 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 concern. ITAT 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."

6. We have also perused the decision of the ITAT, Cochin Bench in the case of Arun Textile (P) Ltd. (supra), wherein the Tribunal extracted the relevant para from the above said judgment of the Hon'ble High Court of Andhra Pradesh (supra) in para 6 of its order and held that such receipts fall in capital zone. For the sake of completeness of this order, relevant lines from para 6 of the said Tribunal's order dated 12.9.2014 are extracted as under:

"6. Both sides heard. We have perused the orders of the authorities below and examined the decision on which both sides have place reliance. The Hyderabad Bench of the Tribunal in the case of My Home Power Ltd. (supra) has held carbon credit as capital receipts. The relevant extract of the findings of the coordinate Bench are as under:

> "We have heard both the parties and perused the material on record. Carbon credit is in the nature of 'an element' received to improve world atmosphere and environment reducing carbon heat and gas emissions. The entitlement earned for carbon credits can, at best, be regarded as a capital receipt and cannot be taxed as revenue receipt. It is not generated or created due to carrying on business but it is accrued due to 'world concern'. It has been made available assuming character of transferable right or entitlement only due to world concern. The source of carbon credit is world concern and environment. Due to that the assessee gets aprivilege in the nature of transfer of carbon credits. Thus, the amount received for carbon credits has no element of profit or gain and it cannot be subjected to tax for the assessment year under consideration in terms of section 2(24), 28, 45 and 56 of the Income Tax Act, 1961. Carbon credits are made available to the assessee on account of saving of energy consumption and not because of its business. Further, in our opinion, carbon credits cannot be considered as a bi-product. It is a credit given to the assessee under the Kyoto Protocol and because of international understanding. Thus, the assessee who have surplus carbon credits can sell them to other assessees to have capped incidence of one's business and it is a credit of reducing emission. The persons having carbon credits get benefit by selling the same to a person who needs carbon credits to overcome one's negative point carbon credit. The amount received is not received for producing and / or selling any product, bi-product or for rendering any service for carrying on the business. In our opinion, carbon credit is entitlement or accretion of capital and hence income earned on sale of these credits is capital receipt. For this proposition, we place reliance on the judgment of the Supreme Court in the case of CIT vs. Maheshwari Devi Jute Mills Ltd. [1965] 57 ITR 36 (SC)……..In the present case, the assessee transferred the carbon credits like loom hours to some other concerns for certain consideration. Therefore, the receipt of such consideration cannot be considered as business income and it is a capital receipt. Accordingly, we are of the opinion that the consideration received on account of carbon credits cannot be considered as income taxable in the assessment year under consideration……..However, there is no cost of acquisition or cost of production to get this entitlement. Carbon credit is not in the nature of profit or interest he nature of income."

7. The Hon'ble Andhra Pradesh High Court in the appeal of the Revenue in ITA No.60 of 2014 decided on February 19, 2014 My Home Power Ltd. (supra) has upheld the view taken by the Hyderabad Bench in the case of My Home Power Ltd. (supra)"

7. Therefore, considering the above, it is now settled proposition in law that in principle the receipts on sale of carbon credits should not brought into the 'Profit & Loss Account' and it relates to the 'balance sheet' item. Consequently, the question of making a claim u/s.80IA(4) of the Act, allowability of the same or otherwise becomes an academic exercise. In view of the above, the question raised by the Revenue in its appeal and the cross objections raised by the assessee are required to be dismissed as academic. We order accordingly."

Respectfully following the above order,we decide second effective ground of appeal against the AO.

As a result appeal filed by the AO stands dismissed.

फलतः निर्धारिती अधिकारी द्वारा दाखिल की गई अपील नामंजूर की जाती है .

Order pronounced in the open court on 12th,June, 2018.
आदेश की घोषणा खुले न्यायालय में दिनांक 12,जून 2018 को की गई।

Sd/-	**Sd/-**
(सी.एन.प्रसाद /C.N.PRASAD)	**(राजेन्द्र / RAJENDRA)**
न्यायिक सदस्य / **JUDICIAL MEMBER**	**लेखा सदस्य / ACCOUNTANT MEMBER**

मुंबई Mumbai; दिनांक/Dated : 12/06/2018.
MP/ JV, Sr.PS

आदेश की प्रतिलिपि अग्रेषित/Copy of the Order forwarded to :

1.Appellant /अपीलार्थी **2.** Respondent /प्रत्यर्थी
3.The concerned CIT(A)/संबद्ध अपीलीय आयकर आयुक्त, **4.**The concerned CIT /संबद्ध आयकर आयुक्त
5.DR " D " Bench, ITAT, Mumbai /विभागीय प्रतिनिधि, खंडपीठ,आ.अधि.मुंबई
6.Guard File/गार्ड फाईल

सत्यापित प्रति //True Copy//

आदेशानुसार/ **BY ORDER,**
उप/सहायक पंजीकार **Dy./Asst. Registrar**
आयकर अपीलीय अधिकरण, मुंबई **/ITAT, Mumbai.**