M/S. Berger Paints India Ltd vs C.I.T., Delhi-V on 28 March, 2017

Equivalent citations: AIR 2017 SUPREME COURT 1665, AIR 2017 SC (CIVIL) 1713, 2017 (13) SCC 726, (2017) 4 SCALE 36, 2017 (177) AIC (SOC) 32 (SC)

Author: Abhay Manohar Sapre

Bench: Abhay Manohar Sapre, R.K. Agrawal

REPORTABLE

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL No.2162 OF 2007

M/s Berger Paints India Ltd. ….Appellant(s)

VERSUS

C.I.T., Delhi-V …Respondent(s)

WITH

CIVIL APPEAL No.2163 OF 2007

M/s Berger Paints India Ltd. ….Appellant(s)

VERSUS

C.I.T., Delhi-V …Respondent(s)

J U D G M E N T

Abhay Manohar Sapre, J.

1) These appeals are filed against the final judgment and orders dated 15.05.2006 passed by the High Court of Delhi at New Delhi in Appeal Nos. ITA No. 799 of 2004 and 797 of 2004 whereby the High Court dismissed the appeals filed by the appellant herein arising out of the order dated 26.04.2004 and 25.08.2004 passed by the Income Tax Appellate Tribunal, New Delhi(hereinafter referred to as "the Tribunal) in I.T.A. No.2307/Del/2000(Assessment Year 1996-97) and I.T.A. No.1434/Del/2001(Assessment Year 1997-98) respectively.

2) In order to appreciate the issue involved in these appeals, it is necessary to state few relevant facts

infra.

3) The appellant is a Limited Company engaged in the business of manufacture and sale of various kinds of paints. For the Assessment Year 1996-97, the appellant (assessee) filed their income tax return and declared the total income at Rs.3,64,64,527/-. It was, however, revised to Rs.3,58,92,771/- and then again revised to Rs. 3,57,26,644/-. The return was then processed by the Assessing Officer(in short "A.O.") under Section 143 (1B) of the Income Tax Act (hereinafter referred to as "the Act") at an amount of Rs.3,63,03,128/-.

4) A notice was issued by the A.O. to the appellant (assessee) under Section 143(2) of the Act which called upon the appellant to explain as to on what basis the appellant had claimed in the return a deduction under the head "preliminary expenses" amounting to Rs.7,03,306/- being 2.5% of the "capital employed in the business of the company" under Section 35D of the Act.

5) The appellant (assessee) replied to the notice. The appellant (assessee) contended therein that it had issued shares on a premium which, according to them, was a part of the capital employed in their business. The appellant, therefore, contended that it was on this basis, it claimed the said deduction and was, therefore, entitled to claim the same under Section 35D of the Act.

6) The A.O. did not agree with the explanation given by the appellant. He was of the view that the expression "capital employed in the business of the company" did not include the "premium amount" received by the appellant on share capital. The A.O. accordingly calculated the allowable deduction under Section 35D of the Act at Rs.1,95,049/- and disallowed the remaining one by adding back to the total income of the appellant for taxation purpose.

7) The appellant, felt aggrieved, filed appeals before the Commissioner of Income Tax (appeals). The Commissioner was of the view that since the "capital employed" consists of subscribed capital, debentures and long term borrowings, any "premium" collected by the appellant-Company on the shares issued by it should also be included in the said expression and be treated as the capital contributed by the shareholders. The Commissioner also was of the view that the share premium account, which is shown as reserve in the balance sheet of the Company, was in the nature of the capital base of the Company and hence deduction under Section 35D of the Act was admissible with reference to the said amount also. Accordingly, the Commissioner allowed the appeals, set aside the order of A.O and disallowance of Rs.5,08,257/- made by the A.O. and, therefore, deleted the said sum. In other words, the Commissioner allowed the deduction claimed by the appellant of the entire amount under Section 35D of the Act.

8) The Revenue, felt aggrieved, filed appeals before the Tribunal. The Tribunal allowed the appeals and reversed the view taken by the Commissioner of Income Tax (Appeals). The Tribunal held that the premium collected by the appellant-Company on the share capital did not tantamount to "capital employed in the business of the Company" within the meaning of Section 35D(3) of the Act.

9) It is against these orders, the Company-assessee felt aggrieved and filed two separate appeals under Section 260A of the Act before the High Court. By impugned judgment/orders, the High

Court dismissed the appeals and affirmed the orders of the Tribunal.

10) Felt aggrieved, the Assessee-Company has filed these appeals before this Court.

11) The short question that falls for consideration in these appeals is whether "premium" collected by the appellant-Company on its subscribed share capital is “capital employed in the business of the Company" within the meaning of Section 35D of the Act so as to enable the Company to claim deduction of the said amount as prescribed under Section 35D of the Act?

12) Heard Mr. Radha Shyam Jena, learned counsel for the appellant-Company and Mr. Mukul Rohtagi, learned Attorney General for the respondent.

13) Having heard the learned counsel for the parties and on perusal of the record of the case, we find no merit in the appeals.

14) Section 35D(3) of the Act with which we are concerned in these appeals reads as under:

> “Where the aggregate amount of the expenditure referred to in sub- section(2) exceeds an amount calculated at two and one-half percent-
>
> (a) of the cost of the project, or where the assessee is an Indian company, at the option of the company, of the capital employed in the business of the company, the excess shall be ignored for the purpose of computing the deduction allowable under sub-

section(1);

[Provided that where the aggregate amount of expenditure referred to in sub- section(2) is incurred after the 31st day of March, 1998, the provisions of this sub-section shall have effect as if for the words “two and one-half per cent”, the words “five percent” had been substituted.]* *Ins. by the Finance(No.2) Act, 1998(2) of 1998), sec,14(b)(w.e.f. 1-4- 1999)”

15) The expression "capital employed in the business of the company" is defined in the Explanation appended to the Section in clause (b) which reads as under:

> “(b) “capital employed in the business of the company” means-
>
> (i) in a case referred to in clause(i) of sub-section(1), the aggregate of the issued share capital, debentures and long term borrowings as on the last day of the previous year in which the business of the company commences;
>
> (ii) in a case referred to in clause(ii) of sub-section(1), the aggregate of the issued share capital, debentures and long term borrowings as on the last day of the previous year in which the extension of the industrial undertaking is completed or, as the case

may be, the new industrial unit commences production or operation, in so far as such capita, debentures and long term borrowings have been issued or obtained in connection with the extension of the industrial undertaking or the setting up of the new industrial unit of the company;"

16) The Division Bench of the High Court in the impugned order examined the question lucidly. The learned Judge T.S. Thakur, J. (as His Lordship then was and later became CJI) speaking for the Bench held as under:

"6. A careful reading of the above would show that in the case of an Indian company like the appellant, the aggregate amount of expenditure cannot exceed 2.5% of the capital employed in the business of the Company. The crucial question, therefore, is as to what is meant by capital employed in the business of the Company for it is the amount that represents such capital that would determined the upper limit to which the amount of allowable deduction can go. The expression has been given a clear and exhaustive definition in the explanation to sub-section 3. It reads as:

"(b)……" "7. The above clearly shows that capital employed in the business of the company is the aggregate of three distinct components, namely, share capital, debentures and long term borrowings as on the dates relevant under sub-clauses(i) and (ii) of Clause(b) of the explanation extracted above. The term 'long term borrowing' has been defined in clause (c) to the explanation. It is nobody's else that the premium collected by the Company on the issue of shares was a long term borrowing either in fact or by a fiction of law. It is also nobody's case that the premium collected by the Company was anywhere near or akin to a debenture. What was all the same argued by the counsel for the appellant was that premium was a part of the share capital and had therefore to be reckoned as 'capital employed in the business of the company'. There is, in our view, no merit in that contention. The Tribunal has pointed out that the share capital of the Company as borne out by its audited accounts is limited to Rs.7,88,19679/-. The company's accounts do not show the reserve and surplus of Rs.19,66,36,734/- as a part of its issued, subscribed and paid up capital. It is true that the surplus amount of Rs.19,66,36,734/- is taken as part of share holders fund but the same was not a part of the issued, subscribed and paid up capital of the Company. Explanation to Section 35D(3) of the Act does not include the reserve and surplus of the Company as a part of the capital employed in the business of the Company. If the intention was that any amount other than the share capital, debentures and long term borrowings of the Company ought to be treated as part of the capital employed in the business of the company, the Parliament would have suitably provided for the same. So long as that has not been done and so long as the capital employed in the business of the Company is restricted to the issued share capital, debentures and long term borrowings, there is no room for holding that the premium, if any, collected by the Company on the issue of its share capital would also constitute a part of the capital employed in the business of the Company for purposes of deduction under Section

35D. The Tribunal was, in that view of the matter, perfectly justified in allowing the appeal filed by the Revenue and restoring the order passed by the Assessing Officer."

17) We are in complete agreement with the view taken by the High Court quoted supra as, in our considered opinion, the well-reasoned judgment/order of the High Court correctly explains the true meaning of the expression employed in sub-section3(b) of Section 35D read with Explanation

(b) quoted above, calling no interference in the appeals.

18) In our considered opinion also, the "premium amount" collected by the Company on its subscribed issued share capital is not and cannot be said to be the part of "capital employed in the business of the Company" for the purpose of Section 35D(3)(b) of the Act and hence the appellant-Company was rightly held not entitled to claim any deduction in relation to the amount received towards premium from its various shareholders on the issued shares of the Company.

19) This we say for more than one reason. First, if the intention of the Legislature were to treat the amount of "premium" collected by the Company from its shareholders while issuing the shares to be the part of "capital employed in the business of the company", then it would have been specifically said so in the Explanation(b) of sub-section(3) of Section 35D of the Act. It was, however, not said.

20) Second, on the other hand, non-mentioning of the words does indicate the legislative intent that the Legislature did not intend to extend the benefit of Section 35D to such sum. Third, these two reasons are in conformity with the view taken by this Court in the case of Commissioner of Income Tax, West Bengal vs. Allahabad Bank Ltd., (1969) 2 SCC 143. wherein the question arose as to whether an amount of Rs.45,50,000/- received by the assessee (Bank) in cash as "premium" from its various shareholders on issuing share on premium is liable to be included in their paid up capital for the purpose of allowing the assessee to claim rebate under Paragraph D of Part II of the first Schedule to the Indian Finance Act 1956.

21) It was noticed therein that Part II - paragraph D while specifying the rates of super tax had added an Explanation, which reads as under:

Explanation.—For the purposes of para D of this part—

(i) the expression 'paid-up capital' means the paid-up capital (other than capital entitled to a dividend at a fixed rate) of the Company as on the first day of the previous year relevant to the assessment for the year ending on 31st day of March, 1957, increased by any premiums received in cash by the company on the issue of its shares, standing to the credit of the share premium account as on the first day of the previous year …." (Emphasis supplied)

22) This Court speaking through the learned Judge J.C. Shah, J. (as His Lordship then was and later became CJI) after examining the issue in the context of Para D read with its Explanation held that “share premium account” was liable to be included in the paid up capital for the purposes of computing rebate. One of the reasons to allow such inclusion with the paid up capital was that such inclusion was permitted by the specific words in the Explanation. Such was, however, not the case here.

23) As rightly pointed out by the learned Attorney General appearing for the Revenue, the Companies Act provides in its Schedule V- Part II (Section

159) a Form of Annual Return, which is required to be furnished by the Company having share capital every year. Column III of this Form, which deals with capital structure of the company, provides the break up of "issued shares capital break up". This column does not include in it the "premium amount collected by the company from its shareholders on its issued share capital". This is indicative of the fact that such amount is not considered a part of the capital unless it is specifically provided in the relevant section.

24) Similarly, as rightly pointed out, Section 78 of the Companies Act which deals with the "issue of shares at premium and discount" requires a Company to transfer the amount so collected as premium from the shareholders and keep the same in a separate account called "securities premium account". It does not anywhere says that such amount be treated as part of capital of the company employed in the business for one or other purpose, as the case may be, even under the Companies Act.

25) In the light of foregoing discussion, we find no merit in these appeals. The appeals thus fail and are accordingly dismissed.

.....J. [R.K. AGRAWAL] .....J. [ABHAY MANOHAR SAPRE] New Delhi;

March 28, 2017
