IN THE HIGH COURT OF DELHI AT NEW DELHI

ITA 222/2009

MAHARISHI HOUSING DEVELOPMENT FINANCE CORPORATION LTD. ..... Appellant
Through: Mr Manoj Arora

versus

ASSISTANT COMMISSIONER

OF INCOME TAX .....
Respondent
Through: Mr Sanjeev Sabharwal

CORAM:
HON'BLE MR. JUSTICE BADAR DURREZ AHMED
HON'BLE MR. JUSTICE V.K. JAIN

O R D E R
08.04.2010

1. The assessee / appellant had initially proposed the following questions as substantial questions of law, which, according to the appellant, require consideration of this court:-

(a) Whether, while computing the profits for financing housing activity for the purposes of Section 36(1) (viii), the bifurcation of expenses should be taken on the basis of the revenue earned from the two activities or on the basis of capital deployment at the end of the year ?

(b) Whether the Tribunal was correct in upholding the order of the Assessing Officer attributing only Rs.29,22,000/- on non housing finance activities when the receipts from the non-housing financing activity amounted to 23% of the total receipts ?

(c) Whether the Tribunal was correct in taking the funds deployed in the two activities on the last day of accounting year as the basis of allocation of expenses when the fund deployed in the housing finance activity would change from day to day ?

(d) Whether the Tribunal was correct in upholding the addition on account of accrued interest of Rs.16,49,947 ?

(e) Whether the Non-performing Assets in the case of housing finance companies have to be provided on the basis of the guidelines issued by the National

Housing Bank under the National Housing Bank Act ?
(f) Whether, in view of the conflict between the guidelines issued by the RBI and the National Housing Bank and Rule 6 EB of the Income-tax Rules, the term ?shall? used in Section 43D would have to be read as ?may? so as to reconcile the two and the provision for non performing assets could be made on the basis of the guidelines issued by the NHB ?
(g) Whether, when Section 43 D of the Income-tax Act provides that the Rules shall be framed in conformity with the NHB guidelines as far as practicable, Rule 6 EB insofar as it goes beyond the guidelines prescribed by NHB / RBI is void and ultra vires the Act ?
(h) Whether the Tribunal was correct in upholding the disallowance of Rs.1,52,850/- being a payment to a non-resident Indian in view of provision of Section 40(A)(i) of the Act ?
(i) Whether it is obligatory on the part of the assessee to deduct tax at source from payments made to non residents or to obtain a certificate under Section 195(2) of the Income Tax Act even though the payment to the recipient was not liable to tax in India ?

2. However, in the course of the arguments, the learned counsel for the appellant submitted that questions (b) and (c) are subsumed in question (a) itself. Furthermore, he submitted that the proposed questions (d), (e), (f) and (g) do not require any further consideration of this court inasmuch as the same have to be decided, in any event, in favour of the revenue in view of the decision of the Supreme Court in the case of Southern Technologies Ltd v. Joint Commissioner of Income-tax, Coimbatore: 320 ITR 577 (SC).

3. Insofar as the proposed questions (h) and (i) are concerned, the counsel for the parties submit that the matter may have to be remanded to the Tribunal in view of the decision of this court in the case of Van Oord ACZ India (P) Ltd v. Commissioner of Income-tax [ITA No.439/2008, decided on 15.03.2010]. A division Bench of this court in the said decision, inter-alia, came to the conclusion that the obligation to deduct the tax at source would arise only when the payment was chargeable under the provisions of the Income-tax Act. This observation was made in the context of Section 40 (a)(i) of the Income-tax Act, 1961. The appellant / assessee had made the payment of Rs 1,52,850/- to a non-resident Indian. The issue was as to whether the same could be allowed as deduction given the fact that the appellant / assessee had not deducted the TDS on the same. ***In view of the decision of this court in the case of Van Oord (supra), the question of deducting the tax at source in the case of payment to a non-resident Indian would only arise if the said payment was chargeable to tax***

in the hands of the recipient under the provisions of the Income-tax Act. In case it was not chargeable to tax, then the assessee would not have been under any obligation to deduct the TDS. If that were to be so, then the amount of Rs 1,52,850/- would have to be allowed as an expenditure. On the other hand, if the assessee / appellant was under an obligation to deduct the tax at source in view of the fact that the payment made to the non-resident was chargeable to tax under the provisions of the said Act, then, since the assessee had not deducted any tax at source, the said amount would not be allowable as an expenditure. However, in o*rder to determine this question, a finding was required to be returned as to whether the payment made by the assessee / appellant to the non-resident Indian was chargeable to tax in the hands of the non-resident Indian in India. This aspect of the matter has not been considered by the Income-tax Appellate Tribunal and it is for this limited purpose that we feel that it would be necessary to remand the matter on this question alone to the said Tribunal to return a finding as to whether the payment of Rs 1,52,850/- made to the non-resident Indian was exigible to income-tax in the hands of the said non-resident Indian in India.*

4. The aforesaid discussion, therefore, leaves us with the proposed question (a) which we feel is a substantial question of law which requires determination of this court. Consequently, the appeal is admitted. The substantial question of law, which arises for consideration of this court, is:-
?Whether while computing the profits for financing housing activity for the purposes of Section 36(1) (viii), the bifurcation of expenses should be taken on the basis of the revenue earned from the two activities or on the basis of capital deployment at the end of the year ??

5. The paper books be filed by the appellant / assessee within three months as per rules.
BADAR DURREZ AHMED, J

V.K. JAIN, J
APRIL 08, 2010
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