

industrial Development Bank of Vs. the Dcit, Spl. Range-36

industrial Development Bank of Vs. the Dcit, Spl. Range-36

SooperKanoon Citation : sooperkanoon.com/72385

Court : Income Tax Appellate Tribunal ITAT Mumbai

Decided On : Jan-03-2003

Reported in : (2004)91ITD34(Mum.)

Judge : B Chhibber, A Jain

Appellant : industrial Development Bank of

Respondent : The Dcit, Spl. Range-36

Judgement :

1. Committee On Disputes (C.O.D.) approval has not been granted for ground nos. 1 These grounds are, therefore, rendered infructuous and are rejected as such.

2. By way of Ground No. 3, the assessee challenges the action of the learned Commissioner (Appeals) in not allowing the expenditure incurred by it under its Technical Assistance Fund (hereinafter referred to as 'the T.A.F.')., amounting to Rs. 3,97,63,468, on the ground that the said expenditure amounts to application of income 3. The learned Assessing Officer observed that the assessee is maintaining Separate funds, namely, Gratuity Fund, Voluntary Health Scheme Fund, Disability Assistance Fund, Staff Welfare Fund and the T.F.A., that while computing the income from business and profession, the expenses in these Funds were debited and the income earned from all the Funds, except the T.A.F., were credited; that when asked as why the expenditure incurred under the T.A.F. should be allowed as a business expenditure, the assessee stated that the Fund was set up in July, 1977, in pursuance of the statutory role and function of the assessee

IDBI and therefore, the expenditure from this Fund is eligible as a business expenditure of the assessee; that from this explanation, it was seen that the assessee has set up the T.A.F. to fulfill its statutory obligation; that annual contribution to the T.A.F. is made from the profit and Loss Appropriation Account, and that however, expenses incurred from the T.A.F. for support for management upgradation programmes, seminars, studies towards various industrial issues, energy conservation and grants to voluntary organizations, etc., are debited in the Profit and Loss Account. It was held that the assessee's contention that these expenses are business expenses was not acceptable that whatever expenses the assessee is incurring for fulfilling its statutory obligation is, in fact, application of the assessee's income; that the fact that the assessee is not debiting the contribution to the T.A.F. clearly indicates that the activity of the T.A.F. is not the business activity of the assessee; that since the setting up of the T.A.F. is in pursuance of the general guidelines laid down in Section 9 of the IDBI Act, which section authorizes the assessee to carry on various activities of promotional nature, it cannot be claimed that the setting up of the T.A.F. was a statutory necessity, without which, the assessee cannot carry on its business activity; that therefore, like the contribution to the T.A.F., the expenses incurred from it are also application of income; and that this view was further strengthened from the fact (SIC) shown by the assessee include grants to various voluntary organizations. The claim that the said expenditure is a business expenditure of the assessee was thus disallowed.

4. The assessee carried appeal to the learned Commissioner (Appeals), before whom, it was argued that the activities on which the expenditure is incurred from the T.A.F. have a direct bearing on the assessee's business of providing long-term finance for industrial development in India; that the expenditure was incurred wholly and exclusively in furtherance of this business and for no other object; that hence, this expenditure is allowable under Section 37(1) of the Income-tax Act: that under Section 9(1) of the IDBI Act, the assessee is entitled to provide technical (legal, marketing) and administrative assistance to any industrial concern or any person for promotion, management or expansion of any industry; that the assessee has been extending support by way of granting soft loans to various agencies for the development of industry in the country out of the T.A.F.; and that

the assistance granted under the T.A.F. is given only to reputed agencies like voluntary agencies and technical consultancy institutions, etc., for conducting development programmes, for undertaking research studies and for setting to production-cum-training centers.

5. Vide the impugned order, the learned Commissioner (Appeals) observed that under Section 37(1) of the Income-tax Act, only such expenditure can be education. as has been incurred for the purpose of business; that an expenditure need not result in the earning of income, but it must be incurred for the purposes of business; that in order to be eligible for deduction under Section 37(1) of the Income-tax Act, there must be a connection between the expenditure and the business of the assessee; that the business of the present assessee is give loans to industries by way of contribution to shares, debentures, etc.; that the assistance given by the assessee is not on account of any business necessity, but a voluntary assistance given by the assessee to other agencies; that the amount of assistance without any business connection cannot be deducted out of the taxable income of the assessee; that there is no evidence to show any business necessity for giving assistance to various agencies and therefore, the deduction claimed by the assessee on account of technical assistance to various agencies is not admissible; that it is a voluntary expenditure incurred by the assessee; and that it might have been incurred in view of the enabling provisions of the IDBI Act, but since there is no business connection with the expenditure incurred by the assessee, it is not admissible under Section 37(1) of the Income-tax Act. So, the claim was rejected.

6. Challenging the findings of the learned Commissioner (Appeals), the learned Authorised Representative of the assessee, besides broadly reiterating the stand of the assessee before the learned Lower Authorities, has largely placed reliance on the order of the learned Commissioner (Appeals) in the assessee's own (SIC) for the assessment year 1993-1994, passed on 17.5.1999. In this detailed order, the issue at hand has been decided in favour of the assessee. Per contra, supporting the orders of both the Tax Authorities, the learned Departmental Representative draws our attention to page 15 of the order of the Commissioner (Appeals) for A.Y. 1993-94. Therein, it has been observed that the important (SIC) of the assessee, supported by the T.A.F. include assistance to voluntary agencies

working on self-employment, etc., programmes for socially and physically disadvantage sections of the society, and assistance to the Indian Spinal Injuries Centre set up by the Government of India for treatment of spinal injuries. The learned D.R. urges that this goes to show that at least these activities are philanthropic in nature and bear no relation whatsoever to the business of the assessee, and that they are not entitled to the exemption sought by the assessee.

7. We have heard the parties and have perused the material on record.

Upholding the assessment order, the learned Commissioner (Appeals) has held that there is no evidence to show any business necessity for giving assistance to various agencies and that therefore, the deduction claimed is not admissible. Is it so? Let us see.

8. As per the Preamble of the IDBI Act, 1964, the said Act seeks to establish the Industrial Development Bank of India (I.D.B.I.) as the principal financial institution for co-ordinating, in conformity with national priorities, the working institutions engaged in promoting or developing industry, for assisting the development of such institutions for providing credit and other facilities for development of industry and matters connected therewith.

9. Section 9 of the IDBI Act enumerates the various business activities the Bank is authorized to carry on in furtherance of its principal objective, as delineated in the Preamble of the Act. According to this section, the Bank shall function, in order to realize its main objective, in such manner as it may deem appropriate. The business activities enumerated in the said section include: Undertaking research and surveys for evaluating or dealing with marketing of investments and undertaking and carrying on techno-economic studies in connection with the development of industries [Section 9(1)(h); Providing technical (legal, marketing) and administrative assistance to any industrial concern or any person for promotion, management or expansion of any industry [Section 9(1)(i)].

10. Section 9A of the IDBI Act prohibits the Bank from, subject to the proviso to that section, entering into any kind of business with any industrial concern, of which any of the directors of the Bank is a proprietor, partner, director, manager,

agent, employee or guarantor, or in which one or more directors of the Bank together hold substantial interest ('substantial interest' within the meaning of the Explanation to Section 9A, in relation to an industrial concern, being a beneficial interest held by one or more of the directors of the Bank or by any relative of such director, whether singly or taken together, in the shares of the industrial concern, the aggregate amount paid up on which either exceeds five lakh rupees or five per cent of the paid-up capital of the industrial concern, whichever is the lesser). This, clearly, is in consonance with the intent of the legislature in forbidding allowance of capital and/or personal expenditure as a deduction under Section 37(1) of the Income-tax Act. Else, the expenditure could not be termed as having been incurred 'wholly and exclusively for the purposes of the business'.

11. Section 37(1) of the Income-tax Act, 1961, lays down that any expenditure laid out and expended wholly and exclusively for the purposes of the business shall be allowed in computing the income chargeable under the head profits and gains of business or profession".

Such expenditure, however, should not be of the nature described in Sections 30 to 36, nor should it be capital expenditure or personal expenses of the assessee.

12. During the assessment proceedings, the assessee filed a letter dated 10.01.1995 Statement 'D' enclosed therewith contains an explanatory note on the working of the T.A.I. and its admissibility under the Income-tax Act. For ready reference, this statement 'D' is being appended as Annexure-I with this order. It may be read as a part hereof. This statement reveals that the T.F.A. has been set up and is being utilized for discharging the statutory obligations sanctioned by Section 9 of the IDBI Act, in the form of the business activities of the assessee. Evidently these activities include the giving of assistance to various agencies. As per this statement, the T.F.A. is to be utilized, inter alia, for giving assistance by way of grants to various agencies. The validity of his statement has not been refuted by the Authorities below. The said utilization of the T.A.Z.F. is, therefore, within the four corners of the business of the assessee, as mandated by Section 9 of the I.D.B.I. Act. Pertinently, according to the said Section 9, the assessee shall function, in order to realize its main objective, in such manner as it may deem

appropriate. The vires of this section remain unchallenged. Section 9A, as reproduced above, lays down the business prohibited. The business carried on by the assessee is not proved to be falling within such stipulated prohibition. Further, the assessee has also placed before the learned lower Authorities the very many classified details of the expenditure in question. This has been done by bringing on record the assessee's Memorandum dated 19.5.1995 to its Board of Directors. This document has not been discussed by the learned Commissioner (Appeals). Without considering, much less refuting this Memo, the disallowance has been upheld. Once the provisions of (SIC) OF THE idbi Act enjoin upon the assessee to carry on the business envisaged there in, and once the nexus of the expenditure from the T.A.F. with the said business is established by the assessee, and not subverted by the Authorities below, the observation of the learned Commissioner (Appeals) that there is no evidence to show any business necessity for giving assistance to various agencies is rendered but in result of complete misreading and non-reading of the material count evidence on record, besides being merely conjectural and surmisical. The expenditure in question thus, is an expenditure incurred by the assessee wholly and exclusively for the purposes of its business by reason of overriding enablement of statute warranting allowance under Section 37(1) of the Income-tax Act. So far as regards the objection of the Department to the activities indicated in the A.Y. 1993- 94 order of the learned Commissioner (Appeals), it has been held in that order that it would be difficult to decide whether the expenditure incurred from the T.A.F. would definitely bring in benefits for the business in future, for such a possibility is too remote; that at the same time it cannot also be said in the facts of the case that the expenditure was incurred for altruistic or philanthropic considerations; and that it cannot be in the sight of that the assessee carried on such activities for development of industry in general, because it was statutorily required to do so and not because such activity may bring in benefits in the future. Admittedly, this findings have attained (SIC) having not been challenged by way of appeal. Moreover, it is not possible that a statutory institution like the assessee would grant huge sums to a Governmental Centre as sops, that is to say, as an altruistic or philanthropic gesture Regarding the assistance to voluntary agencies working for socially and physically disadvantaged section of the society, neither was the assessee put to prove that the assistance to

such agencies was within the ambit of 'business' of the assessee as laid down by Section 9 of the I.D.B.I. Act, nor has a conclusion been arrived at to the effect that these agencies were carrying on activities beyond the scope of the said Act.

Therefore, the claim of the assessee in this regard is allowed.

13. As a result of this allowance, the salary paid by the assessee to officers on deputation against the T.A.F. is also allowed, answering Ground No. 5 also in favour of the assessee.

14. Ground No. 4 states that exemption has wrongly not been granted under Section 54L of the Income-tax Act, in respect of the sum of Rs. 25 crores invested by the assessee in IDBI Capital Bonds, on the ground that such investment could not be considered as investment under that section, even though there is no bar on the assessee making such investment, either under the Income-tax Act, or under any other law.

15. The assessee while making computation of chargeable income under the head "long-term capital gains", claimed a deduction of Rs. 120.97 crores under Section 54I of the Income-tax Act, on the ground that it has invested Rs. 138.46 crores in an asset specified under that section. The learned Assessing office observed that the assessee has claimed a deduction on Rs. 25 crores on the ground that on 28, 1.1992, it had purchased 9% IDBI Capital Bonds. The assessee asked to explain why this deduction should be allowed in the light of the (SIC) purchased bonds of its own company. The assessee submitted, inter alia.

that there is nothing either in the Income-tax Act, or in the Bond Scheme (SIC) by the IDBI that the IDBI as a taxpayer cannot avail of the exemption under capital gain, by investment in this Scheme. The learned Assessing Officer held that in view of the provisions of Section 54E(1) of the Income-tax Act, for claiming any exemption there under, 'investment or 'deposit' is an essential ingredient. In the case of the assessee, it has merely transferred the amount from one of its own accounts to another. Such a book entry cannot be treated as an investment, even if a certificate/bond is issued in respect thereof.

The plain and simple meaning of investment or deposit is withdrawal of fund from one person and transfer of the same to another person. A person cannot invest or deposit money with himself. In the case of the assessee, there is no transfer of fund. The assessee has merely issued a certificate that so much amount is deposited. Therefore, the assessee is not entitled for exemption under Section 54F, on the strength of such book entries.

16. Before the learned Commissioner (Appeals), it was contented that if an assessee invest capital gain earned in the Capital Bonds, such assessee is entitled to exemption under Section 54E. The IDBI has not been excluded (SIC) investing the capital gain in its own bonds and as, it is entitle to deduction under Section 54E, in respect of Capital Bonds.

17. The learned Commissioner (Appeals) held that the bonds of the assessee have been notified for the purpose of Section 54E, for the investment of a part or whole of the net consideration on transfer of a long-term capital asset qualified for exemption of tax on capital gain, to the extent specified therein. This claim is applicable for other assesses, who invest a part or the whole of the net consideration of transfer of long-term capital assets. The Scheme regarding investment of net consideration on transfer of capital assets was notified by the Government so as to enable the assesses to have sufficient funds and so that other assesses are attracted to the Scheme for the purpose of getting exemption. The object of the Scheme was to attract other assesses to avail exemption in respect of net consideration on transfer of long-term capital assets by investment. Under this Scheme, the assessee has to part with the net consideration and the amount of such net consideration is received by the IDBI, which issues Capital Bonds under the Scheme. But in the case of the assessee IDBI. there is no parting with of funds, because the Capital Bonds are issued by the assessee itself and the funds are kept by the assessee itself for utilizing them in its business activities. Under this Scheme, the assessee is not working as an agent of the Government because it has not been authorized by the Government to issued Capital Bonds on the behalf of the Government. It is issuing Capital Bonds on its own behalf and therefore, purchase of Capital Bonds by the Government is in its own name. In the case of other assesseees, the purpose is to make available funds to the IDBI for the

use of those funds in the business, or for other developmental activities. The assessee IDBI is bound to use its own funds in its own business, or for other developmental activities, and therefore, the purpose of Section 54B is not served.

The assessee was, therefore, held not entitled to exemption under Section 54E in respect of its own funds transferred to the Capital Bonds Scheme.

18. Reiterating the arguments raised before the learned Tax Authorities, the learned Authorised Representative of the assessee submits that if capital gains are invested or deposited in specified assets, exemption can be claimed. An IDBI Capital Bond is a specified asset. There is no prohibition in law on the assessee investing in its own bonds. Though there is a prohibition under Section 77 of the companies Act on buy-back of shares of a company, there is no such bar in law on the assessee investing in its own bonds. Even in the Companies Act, by virtue of Section 77(A), inserted by an amendment bough about in 1999, buy-back of shares by a company is now permitted.

Moreover, the instant transaction is not a buy-back by a company. Also, under Section 54E, the assessee is not in control of the fund. Words have been added to Section 54E, which is impermissible in law.

19. On the other hand, the learned Departmental Representative, relying on the impugned orders, says that what is to be considered is as to whether the transaction involved is 'deposit' or an 'investment'.

20. Section 54E of the Income-tax Act provides, inter alia, that in a case where capital gain arises from the transfer of a long-term capital asset, and an assessee has invested or deposited the whole or any part of the net consideration in any specified asset within six months after the date of such transfer, such assessee is (SIC) to exemption. The Explanation below Section 54E(1) provides that investment can be made in any of the assets specified in Clause (e), of such bonds issued by any public sector company, as the Central Government may by notification specified in this behalf. Vide Notification dated 13.4.1987, the Government specified the three years Industrial Development Bank of India Capital Bonds issued by the IDB, for the purposes of the said Clause (c). In

pursuance of this Notification, the assessee framed a Bond Scheme. A copy of the Scheme was placed before the learned Assessing Officer by the assessee. Evidently, the Scheme is available to all tax payers resident in India, other than minors and persons of unsound mind. (SIC) therefore. the assessee was not precluded from opting for THE Scheme. However, overtly, it seems absurd that the legislative intent in not providing for a distinct bar against an assessee investing in its own Scheme, so as to entitle itself to claim exemption under Section 54E, would be to allow such a legal infeasibility. At first sight, the request of the assessee under Section 54E and the intendment of the legislature in canting that section appear to be mutually contradictory. It is not so, as we shall presently see.

21. As rightly observed by the learned Assessing Officer, a person cannot invest or deposit money with himself. It is this seemingly anomalous situation which has prompted the exemption claimed by the assessee to be disallowed at the hands of the learned Tax Authorities.

But if we look hard and close enough, the mist lifts. It is not a case where there is no paring with of funds. The fund in which the investment has been made does not remain or continue with the assessee.

The assessee undeniably has not control over this fund. So, it is wrong to say that the assessee is bound to use this fund of its own in its own business, or for other developmental activities and that therefore, the purpose of Section 54E is defeated. The assessee having no control over or access to the fund, it is not possible for the assessee to utilize it in its own business. That being so, even though the depositor investor/transferor and the transferee remain one and the same, i.e., the assessee itself, the fund is safely out of the reach of the assessee. This presents a simulated setting where in spite of the assessee transferring the amount to its own fund, it has no power over the said fund, thereby bringing its case at par with that of an assessee other than the IDBI itself. Hence, the purpose of Section 54E is fully served, the assessee having complied with, to the word, the terms of the Bond Scheme, and there being no prohibition in law against the assessee investing in the Scheme, in the obtaining scenario. We are thus led but to the result that the assessee is entitled to the exemption claimed.,

This claimed is allowed.

SooperKanoon - India's Premier Online Legal Search - sooperkanoon.com