

THE HIGH COURT OF DELHI AT NEW DELHI

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Judgment delivered on: 01.03.2013

+ **W.P.(C) 1037/2013 & CM 1960/2013**

**SAIPEM TRIUNE ENGINEERING
PVT. LTD AND ANR**

... Petitioner

versus

**ASSISTANT COMMISSIONER
OF INCOME-TAX**

... Respondent

Advocates who appeared in this case:

For the Petitioner : Mr Ajay Vohra with Ms Kavita Jha and Mr Amit Sachdeva

For the Respondent : Mr Sanjeev Rajpal

CORAM:-

HON'BLE MR JUSTICE BADAR DURREZ AHMED

HON'BLE MR JUSTICE R.V.EASWAR

JUDGMENT

BADAR DURREZ AHMED, J (ORAL)

1. This writ petition is directed against the order dated 30.01.2013 passed by the Income Tax Appellate Tribunal, Delhi Bench, whereby the petitioner's application for stay being Stay No. 309/Del/2012 in ITA 5239/Del/2012 relating to the assessment year 2007-08 was disposed of by the Tribunal, inter alia, directing that:-

- (a) The assessee shall pay an amount of ₹ 50 lacs on or before 5th February, 2013.

- (b) The assessee shall continue to pay an instalment of ₹ 1 crore per month till this case is disposed of.
- (c) The order shall be in force for a period of six months or till disposal of appeal, whichever is earlier.

2. The demand raised against the assessee by virtue of the demand notice dated 02.11.2012 is ₹ 16,42,55,970/-, which includes the demand payable pursuant to the order passed by the Commissioner of Income Tax (Appeals) to the extent of ₹ 15,81,63,498/-, the balance being interest under Section 220(2) of the Income Tax Act, 1961 (hereinafter referred to as 'the said Act').

3. The petitioner is aggrieved by the order passed by the Tribunal inasmuch as according to the petitioner it was a case where the Tribunal ought to have granted complete stay of the recovery of the said amount demanded by the respondents during the pendency of the appeal before it. The Tribunal has merely granted instalments and that, according to the petitioner, would cause great hardship to the petitioner particularly as the petitioner has an excellent *prima facie* case.

4. Initially, the petitioner filed a loss return in respect of the assessment year 2007-08 disclosing a loss of ₹ 5,80,21,210/-. In the year

in question, the petitioner had acquired the running business of design and consultancy in the oil and gas sector from Triune Projects Private Limited. The said acquisition was by way of a slump sale and the total amount paid therefor was approximately ₹ 45.68 crores. The said price of ₹ 45.68 crores was divisible into two categories:-

- (i) tangible assets to the extent of approximately ₹ 5.10 crores; and
- (ii) intangible assets to the extent of approximately ₹ 40.58 crores.

5. It is also relevant to note that the assessee (Saipem Triune Engineering Private Limited) is a joint venture of Saipem SPA (Italy) and one Mr Binoy Jacob. Both the joint venture partners have a 50% share in the assessee company. It is also pertinent to note that Mr Binoy Jacob was the major shareholder in Triune Projects Private Limited. It has also been contended by the learned counsel for the petitioner that in respect of the said slump sale, Triune Projects Private Limited had paid capital gain tax to the extent of ₹ 12 crores.

6. In the loss return filed by the petitioner, the petitioner had made a claim of depreciation at the rate of 25% on the intangible assets which was embedded in the slump sale. A claim of depreciation was also made

at the rate of 15% with regard to the tangibles. The Assessing Officer disallowed the depreciation claimed of ₹ 10,14,68,882/- in respect of the intangibles. He, however, allowed the depreciation claimed by the petitioner with regard to the tangible assets. By doing so, the Assessing Officer assessed the income of the petitioner at ₹ 4,34,47,670/- and computed the total tax liability of the petitioner at ₹ 1,61,29,322/-. As against this, the revenue adjusted an amount of ₹ 1,62,40,170/- being the refunds due to the petitioner for the assessment year 2008-09. Thus, according to the computation given by the learned counsel for the petitioner, the entire demand sought to be raised pursuant to the assessment under Section 143(3) by the Assessing Officer, stood cleared by way of adjustment of the refunds due and, in fact, an amount of ₹ 1,10,848/- was shown to be refundable to the assessee in respect of the assessment year 2007-08.

7. The petitioner, being aggrieved by the disallowance of depreciation on intangibles to the extent of ₹ 10,14,68,882/-, went up in appeal before the Commissioner of Income Tax (Appeals). The latter maintained the disallowance and not only that, he added an amount of ₹ 30,44,06,647/- under Section 40A(2) of the said Act. This sum of approximately ₹.

30.44 crores is the difference between the amount allocated for intangibles (i.e. ₹ 40.58 crores) less the amount disallowed by way of depreciation thereon (= approximately ₹ 10.15 crores).

8. The learned counsel for the petitioner submitted that this sum of approximately ₹ 30.44 crores could not, in any event, be added back to the income of the assessee. This is so because the petitioner had never claimed this amount as an expenditure and, therefore, there was no question of Section 40A(2) being applied for adding this amount. *Prima facie*, we agree with the submission made by the learned counsel for the petitioner. This amount had not been claimed by way of expenditure by the petitioner. It was an amount which was embedded in the price paid in the slump sale. Even if we construe the said sale to be a sham or not to be slump sale at all, this amount of ₹ 30.44 crores (approximately) could not be added to the income of the assessee under Section 40A(2) of the said Act or any other provision. Of course, disallowance for depreciation could be made if the law permitted. That disallowance had already been made by the Assessing Officer and, therefore, there was no occasion for any further disallowance insofar as the depreciation amount was concerned.

9. Apart from the said addition of ₹ 30.44 crores (approximately), the Commissioner of Income Tax (Appeals) also made a disallowance of ₹ 16,86,487/- with regard to the depreciation claimed by the petitioner as against the tangible assets. In other words, he disallowed the depreciation on the intangible assets and allowed the major portion of depreciation on tangible assets. Thus, according to the learned counsel for the petitioner, this stand of the Commissioner of Income Tax (Appeals) was inconsistent with the view taken by him that the transaction was a sham transaction. If on the one hand, he disallowed depreciation on intangibles, he could not have, on the other, allowed depreciation on tangibles. *Prima facie*, we also agree with this submission made by the learned counsel for the petitioner.

10. Apart from the aforesaid disallowances, the Commissioner of Income Tax (Appeals) also made certain other disallowances. The result being that the total disallowance made by the Commissioner of Income Tax (Appeals) came to ₹ 31,68,20,064/-. This was by way of enhancement. The total demand which was payable by the petitioner pursuant to the order passed by the Commissioner of Income Tax

(Appeals) came to ₹ 15,81,63,498/- which, along with interest under Section 220(2) of the said Act, came to ₹ 16,42,55,970/-, which has been demanded by virtue of the demand notice dated 02.11.2012. Out of the figure of ₹ 15,81,63,498/-, an amount of ₹ 13,36,32,605/- is the result of tax of ₹ 10,24,63,277/- and interest thereon of ₹ 3,11,69,328/- in respect of the enhancement of ₹ 30.44 crores (approximately) made by the Commissioner of Income Tax (Appeals) with regard to the purported disallowance under Section 40A(2) relating to the intangible assets purchased in the said slump sale. It is necessary to note that out of the total tax demand of ₹ 15,81,63,498/-, an amount of ₹ 1,62,40,170/- already stands paid as it was adjusted against the refunds due for the assessment year 2008-09. The balance tax payable would then be ₹ 14,19,23,328/-, out of which, pursuant to the order passed by the Tribunal, a sum of ₹ 50 lacs has already been paid by 5th February, 2013, which leaves a balance of ₹ 13,69,23,328/- and as against this, an amount of ₹ 13,36,32,605/- is only on account of enhancement made of ₹ 30.44 crores which, *prima facie*, does not appear to be backed by law.

11. In these circumstances, we feel that the petitioner has an excellent *prima facie* case and the Tribunal ought to have granted stay of the

demand raised by the revenue. We set aside the impugned order passed by the Tribunal to the extent of balance payments other than the payment of ₹ 50 lacs already made by the petitioner. The rest of the demand is stayed till the Tribunal disposes of the appeal. The writ petition stands disposed of. Any observations made in this order are only *prima facie* observations and will not be taken into account by the Tribunal while considering and deciding the appeal. We expect that the Tribunal shall decide the appeal expeditiously. The parties have assured that they shall not take any adjournments.

Dasti under the signature of the Court Master.

BADAR DURREZ AHMED, J

R.V.EASWAR, J

MARCH 01, 2013
SR