IN THE HIGH COURT OF BOMBAY AT GOA

TAX APPEAL NO. 05 OF 2008

Resources International,
Patto Plaza,
Panaji, Goa. …. Appellant

Versus

1. Asst. Commissioner of
Income-Tax,
Circle – 1, Panaji, Goa.
2. Income-Tax Appellate Tribunal,
Panaji Bench, Patto Plaza,
Panaji, Goa. ….Respondents.

Mr. Mihir Naniwadekar with Ms. Vinita Palyekar, Advocates for the appellant.

Ms. Asha Dessai, Advocate the respondents.

CORAM : F. M. REIS &
K.L. WADANE, JJ.

Dated : 07th January,2015

ORAL JUDGMENT: (per F. M. Reis, J)

Heard Mr. Mihir Naniwadekar, learned Counsel for the appellant and Ms. Asha Dessai, learned Counsel appearing for the respondent.

2. The above appeal came to be admitted by an order dated 10/03/2008 on the following substantial questions of law:

(A) Whether on the facts and in the circumstances of the case, the appellate Tribunal was right in disallowing the claim relating to demurrage for which liability had arisen in the accounting year, holding that it was a disputed contractual liability and was allowable in the year of arbitration award, while in fact it was not so ?

(B) Whether on the facts and in the circumstances of the case, the appellate Tribunal is right in upholding the order of the Commissioner (Appeal) regarding deductibility of demurrage in the year of the arbitration award when the award itself says that the demurrage liability was not disputed ?

3. We have extensively heard the learned Counsel for the appellant and the learned Counsel for the respondents in support of their rival contentions. It is essentially the contention of the learned Counsel for the appellant that in terms of the findings of Commissioner of Income Tax (Appeal) as well as Income Tax Tribunal, that the fact that the appellants were following the Mercantile System of Accounting has been accepted by the authorities below. In this context, the learned Counsel for the appellant submits that once it is established that the appellants were following the Mercantile System of Accounting, the allowable deduction on account of demurrage have to be accepted as on the date when the liability to pay such demurrage has arisen in terms of the contract. The learned Counsel further points out that the

Tribunal erroneously came to the conclusion that such liability has crystallized only in the year 2001 when the arbitral award came to be passed. The learned Counsel has thereafter taken us through the terms of the agreement and the awards passed by the arbitrator and essentially points out that in terms of the contract executed between the appellant and the owners, there was a specific clause to pay demurrage in cases in which there is delay in clearing the goods. The learned Counsel, as such, points out that the terms of the contract suggests that the amount of payment of demurrage was crystallized as on the date when such delay occurred. The learned Counsel, as such, submits that though the copy of the award as well as the agreement between the parties was produced before ITAT by the appellant, such documents which are material to examine that the deduction on account of demurrage have crystallized in terms of the agreement are not at all considered by the Tribunal. The learned Counsel in support of his submissions has relied upon the judgments of the Apex Court reported in Income Tax Reports which are as follows:

1. (1996) 218 ITR 164, in the case of "*Commissioner of Income-Tax v/s. Kalinga Tubes Ltd.*"
2. (1971) 82 ITR 363, in the case of "*Kedarnath Jute Mfg. Co. Ltd. V/s. Commissioner of Income – Tax (Central), Calcutta*".
3. (1971) 82 ITR 835, in the case of "*Morvi Industries Ltd V/s. Commissioner of Income – Tax (Central), Calcutta*".

4. On the other hand, Ms. Asha Dessai, learned Counsel has supported the impugned order. The learned Counsel has pointed out that as the appellants were following the Mercantile System, the deduction can be allowed only as on the date when the liability has crystallized which according to the learned Counsel is on the date when the arbitral award was passed. The learned counsel further pointed out that the Tribunal has not examined the award as well as the contract between the parties as according to the learned counsel such documents were not produced before the Tribunal. The learned Counsel further points out that the judgments relied upon by the learned Counsel for the appellant are not applicable to the facts of the case.

5. We have examined the contentions of the learned Counsel and with the assistance of the learned Counsel we have also gone through the records. The award passed by the arbitrator as well as the contract between the appellant and the owner would be material to find out as to when the liability to pay demurrage would crystallize in terms of the contract. This is essential specially when the authorities below accept that the appellants were following the Mercantile system of accounting. Taking note of the contention of the learned Counsel appearing for the respondents that the documents were not produced before the Tribunal, Shri Mihir Naniwadekar, learned Counsel appearing for the appellant,

upon instructions, of the appellant has stated that all such documents including the arbitral award as well as the contract between the appellant and the owner were in fact produced before the Tribunal. The learned Counsel for the respondents was unable to dispute the said contention of the appellant.

6. As the said documents were on record and not examined by the authorities below we find appropriate in the interest of justice to quash and set aside the order passed by the Income Tax Tribunal and remand the matter to decide the appeal preferred by the appellant afresh after hearing the parties in accordance with law. The substantial questions of law are answered accordingly.

7. In view of the above, we pass the following order is passed:

O R D E R

1. The appeal is partly allowed.
2. The impugned order dated 10/07/2007 is quashed and set aside.
3. The learned Tribunal is directed to decide the ITA No. 107/PNJ/06-07 for assessment year 1999-2000 afresh after hearing the parties in accordance with law.
4. All contentions of the parties on merits are left open.

8. Appeal is accordingly disposed of.

K.L. WADANE,J. **F. M. REIS,J.**