IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

INCOME TAX APPEAL NO. 965 OF 2015
(Original Tax Appeal No. 40 of 2008 – Goa Bench)

The Commissioner of Income Tax ..Appellant
Vs.
V.S. Dempo and Co. Pvt. Ltd. ..Respondent

....

Ms. Asha Desai, Advocate for Appellant.
Mr. Mihir Naniwadekar, Advocate for Respondent.

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CORAM : M.S. SANKLECHA &
G.S. KULKARNI, JJ.
DATED : 8 SEPTEMBER 2015

P.C.:

The challenge in this appeal under Section 260A of the Income Tax Act, 1961 (the 'Act') is to the order dated 9 July 2007 passed by the Income Tax Appellate Tribunal (the 'Tribunal'). The impugned order is passed in respect of Assessment Year 1990-91.

2. On 23 June 2008, the appeal of the revenue was admitted on the following substantial questions of law:

> "(A) Whether on the facts and in the circumstances of the case, the Tribunal was justified in directing the A.O. to re-compute deduction under Section 80HHC by treating income from interest as

business income and in holding that the same can neither be considered as receipt covered under Explanation to Section 80HHC nor it can be treated as income from other sources?

(B) Whether on the facts and in the circumstances of the case, the Tribunal was justified in holding that the guarantee commission is not of the nature of capital expenditure?

(C) Whether on the facts and in the circumstances of the case, the Tribunal was justified in holding that the A.O. has erred in estimating profits of the Assessing Company from civil construction job under provision of Section 145 of the I.T. Act?"

3. Regarding Question (A):

(a) The impugned order of the Tribunal has held interest income earned by the assessee be classified as income from profits and gains from business and negatived the stand of the revenue that interest income should be classified as income from other sources. To reach the above conclusion, the Tribunal followed its order dated 21 December 2005 in respect of same respondent-assessee for the Assessment Years 1991-92 to 1993-94. The Tribunal interalia records the fact that there is no difference in facts before it and that before the Tribunal while passing the order dated 21 December 2005, which would warrant taking a different view.

(b) The revenue had preferred appeals to this Court being Income Tax Appeal Nos. 64/2006, 66/2006, 69/2006 and 70/2006 against the orders of the Tribunal dated 21 December 2005 and 30 December 2005 in respect of the same respondent-assessee for the Assessment Years 1991-92 to 1993-94 and 1994-95 and 1995-96 respectively. This Court by a common order dated 30 September 2014 upheld the order of the Tribunal in respect of classification of interest income under the head income from profits and gains of business. As pointed above, the impugned order of the Tribunal has merely followed it's earlier order in respect of same respondent-assessee for the Assessment Years 1991-92 to 1993-94 and that view has upheld by this Court in its order dated 30 September 2014. Therefore there is no reason to disturb the finding of the Tribunal in respect of Question (A). In view of the above, Question (A) is answered in affirmative i.e. in favour of the respondent-assessee and against the revenue.

Regarding Question (B):

4. It is agreed position between the Counsel that Question (B) stands covered by the decision of this Court in ***Kinetic Engineering Ltd. Vs. CIT***[1] in favour of the respondent-assessee. In Kinetic Engineering Ltd. (supra) it has been held that guarantee commission paid be treated as revenue expenditure. In this case, it is held that this expenditure was incurred in the ordinary course of business. Accordingly, Question (B) is answered in affirmative i.e. in favour of the respondent-assessee and against the appellant-revenue.

Regarding Question (C):

5. During the assessment proceedings for the subject assessment year, the respondent-assessee challenged the estimation of profits/income in respect of it's civil construction business under Section 145 of the Act. This was on the basis that in respect of it's construction business, it adopts and maintains regular accounts which are duly audited. Therefore it was submitted before the Assessing Officer that the earlier practice of estimation be

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discontinued. The Assessing Officer in his order of assessment accepted the respondent-assessee's contention by interalia recording that though he find merit in the contention, he was constrained to adopt the same procedure as was adopted for the earlier year. We find that the impugned order of the Tribunal has followed its order passed in respect of respondent-assessee for the Assessment Year 1988-89. The order of the Tribunal for the Assessment Year 1988-89 in respect of the respondent-assessee has held that estimation of profits under Section 145 of the Act is not justified. It has not been shown to be disturbed by this Court or by the Apex Court. The revenue has not been able to show why the Tribunal ought not to have followed the order of the Tribunal for Assessment Year 1988-89. Accordingly, Question (C) is answered in affirmative i.e. in favour of the respondent-assessee and against the appellant-revenue.

6. Accordingly, appeal is disposed of in above terms. No order as to costs.

[G.S. KULKARNI, J] **[M.S. SANKLECHA, J.]**