FARAD CONTINUATION SHEET NO.

IN THE HIGH COURT OF JUDICATURE AT BOMBAY NAGPUR BENCH, NAGPUR.

INCOME TAX APPEAL NOS. 141, 142, 143, 144, 145, 146 AND 149 OF 2013

The Commissioner of Income Tax (Central), Nagpur

-vs-

M/s. Solar Capitals Limited, Nagpur.

Office notes, Office Memoranda of Coram, appearances, Court's orders or directions and Registrar's orders.	Court's or Judge's Orders.

Mr. Sharad N. Bhattad and Mr.Abhishek Bhoot, counsel for the petitioner.

Mr. Nitish Joshi and Mr.N.R.Saboo, counsel for the respondents.

CORAM : SMT.VASANTI A. NAIK & A.M.BADAR, JJ.

DATE : 13.08.2015.

Since the issues involved in these Income Tax Appeals are common and since they arise from similar orders passed by the Commissioner of Income Tax (Appeals) and the Income Tax Appellate Tribunal, they are heard together and are decided by this common order.

According to the Department, the notices for re-assessment were issued to the respondents-assesseess under Section 148 of the Income Tax Act on 28/03/2008 or 29/03/2008. The notices related to the assessment years 2002-03 to 2005-06. The assessees appeared before the Assessing Officer and after filing the return, objected to the assessments. The assessees claimed depreciation over and above, the depreciation that was claimed in the original return. The Assessment Officer granted the claim of the assessees for higher depreciation, but disallowed the claim in respect of sales tax liability and the claim under Section 80IA of the Income Tax Act. Being aggrieved by the orders of the Assessing Officer, the respondents-assessees filed appeals before the Commissioner (Appeals). The assessees had questioned the validity of the assessments in the absence of the issuance of notice under Section

143(2) of the Income Tax Act in addition to some other grounds raised in the appeal. Admittedly, notices under Section 143(2) were neither issued nor served on the assessees. The other grounds raised by the assessees were upheld, but the Commissioner of Income Tax (Appeals) held that the assessment was not bad-in-law, in view of the provisions of Section 292BB of the Income Tax Act that were brought on the Statute Book on 01/04/2008, as the assessees had appeared in the proceedings before the Assessing Officer. The assessees preferred appeals before the Income Tax Appellate Tribunal. The Income Tax Appellate Tribunal allowed the appeals filed by the assessees and held that the provisions of Section 292BB of the Income Tax Act would not apply to the assessments in question. The orders of the Income Tax Appellate Tribunal are subjected to challenge in these Income Tax Appeals.

Shri Bhattad, the learned counsel for the Department, submitted that two substantial questions of law were framed in the appeal memorandums for determination in these appeals, namely –

> *(1) Whether on the facts and in circumstances of the case and in law, the Hon'ble ITAT is justified in not upholding the findings of the AO, that the deferred sale tax liability is chargeable to tax as business income of assessees u/s 41(1) on remission thereof, and instead, treating the same as exempt from tax as capital receipt being remission of future liability?*
>
> *(2) Whether on the facts and in circumstances of the case and in law, the Hon'ble ITAT is justified in holding that section 292BB is applicable prospectively, without appreciating the clarification issued by the CBDT, vide its Circular No.1/2009 dated 27/03/2009, clarifying that the provisions of new section 292BB shall apply in all proceedings which are pending on 01/04/2008?*

The learned counsel for the Department fairly states that the first substantial question of law stands answered against the Department after the filing of these appeals by the judgment of the Bombay High Court, reported in ***(2015) 113 DTR (Bom) 267 (Commissioner of Income Tax v. Sulzer India Ltd.& Ors.)***. It is, however, submitted that the appeals are required to be admitted on the second substantial question of law as mentioned herein above. It is submitted that the Tribunal was not justified in holding that Section 292BB of the Income Tax Act was applicable prospectively without giving due weightage to the clarificatory Circular issued by the CBDT bearing No.1 of 2009, dated 27/03/2009. It is submitted that the notices under Section 148 were issued in these cases on 28/03/2008 and 29/03/2008 and since the assessment proceedings were pending before the Assessment Officer, the provisions of Section 292BB would apply. It is stated that the Tribunal ought to have held that the provisions of Section 292BB applied to the case in hand. The learned counsel relied on the judgments of the Allahbad, Jharkhand and the Punjab and Haryana High Courts, reported in ***(2015) 119 DTR (ALL) 158 (Uttar Pradesh Carbon & Chemicals Ltd. v. Tax Recovery Officer & Ors.)***, ***(2013) 90 DTR (Jharkhand) 80 (Milan Poddar v. CIT)*** and ***(2011) 244 CTR (P&H) 110 (Om Sons International v. Commissioner of Income Tax)***. The learned counsel further relied on the unreported judgment in *Income Tax Appeal No.36 of 2009 (The Commissioner of Income Tax (Central) v. M/s. Murli Agro Products Ltd.)*, dated 29/10/2010.

Shri Joshi, the learned counsel for the respondents-assessees, supported the judgment of the Tribunal and submitted that the 2nd substantial question of law also stands answered against the Department by the orders of this Court, dated 15/07/2011 and 01/01/2010 in *Income Tax Appeal Nos.5487 of 2010 (The Commissioner of Income Tax Central v. Shri Jayraj Kapadia)* and *2429 of 2009 (The Commissioner of Income Tax-7 v. Virendra Kumar Agarwal)* respectively. It is submitted that it is held by this Court in the two aforesaid decisions that the provisions of Section 292BB of the Income Tax Act would have no application to the assessment years prior to 01/04/2008. It is submitted that since the provisions of Section 292BB have been introduced by the Finance Act, 2008 with effect from 01/04/2008, Section 292BB would not apply to the assessment proceedings in the present cases, as the assessment proceedings relate to the assessment years 2002-03 to 2005-06.

On hearing the learned counsel for the parties and on a perusal of the judgments referred herein above and relied on by the learned counsel for the parties that no substantial question of law arises for determination in these appeals. The learned counsel for the Department has fairly stated that the 1st substantial question of law has been answered against the Department by the judgment, reported in ***(2015) 113 DTR (Bom.) 267***. In our view, as rightly submitted on behalf of the assessees, the 2nd substantial question of law is also answered against the Department by the two unreported decisions of this Court. It is held by the Bombay High Court in the orders, dated 15/07/2011 in *Income Tax Appeal No.5487 of 2010* and 07/01/2010 in *Income Tax Appeal No.2429 of 2009* that the provisions of Section 292BB would not be applicable to assessments relating to the period before 01/04/2008. Admittedly, in these cases, the assessment relates to the assessment years 2002-03 to 2005-06. In view of the two aforesaid decisions of this Court, we would not like to rely on the judgments of the other High Courts, referred to by the learned counsel for the Department. Even otherwise, the provisions of Section 292BB are clear and unambiguous and no weightage can be given to Clause 42.7 of the clarificatory Circular to read into the provisions, something that is not there. The orders of the Income Tax Appellate Tribunal are just and proper and call for no interference.

Since no substantial question of law arises for consideration in these appeals, the appeals are dismissed with no other as to costs.

JUDGE **JUDGE**

KHUNTE