In the High Court of Judicature at Madras

Dated : 14.10.2015

Coram :

The Honourable Mr.Justice V.RAMASUBRAMANIAN

and

The Honourable Mr.Justice T.MATHIVANAN

Tax Case Appeal No.2249 of 2006

M/s.Rajapalayam Mills Limited,
Rajapalayam-626117. ...Appellant

Vs

The Deputy Commissioner of
Income Tax, Virudhunagar. ...Respondent

APPEAL under Section 260-A of the Income Tax Act, 1961 against the order dated 31.8.2005 made in I.T.A.No.1615(Mds)/2003 on the file of the Income Tax Appellate Tribunal, Chennai 'C' Bench.

For Appellant : Mr.J.Bala Chander
For Respondent : Mr.M.Swaminathan, Sr.Standing Counsel

JUDGMENT WAS DELIVERED BY V.RAMASUBRAMANIAN,J

This appeal is filed by the assessee under Section 260A of the Income Tax Act, 1961. It was admitted on 6.9.2006 on the following substantial questions of law :

> *"(i) Whether on the facts and in the circumstances of the case, the Appellate Tribunal*

was right in law in holding that the appellant is not entitled to withdraw the claim of depreciation in the regular assessment proceedings made under Section 143(3) of the Act, without filing a revised return of income, even though the assessment under Section 143(1)(a) has been completed and an order under Section 154 to rectify the same has been passed prior to issuance of notice under Section 143(2) of the Act ?

(ii) Whether on the facts and in the circumstances of the case, the Appellate Tribunal was right in law in holding that the appellant is not entitled to withdraw the claim of depreciation prior to the completion of assessment under Section 143(3) without filing a revised return of income ? and

(iii) Whether on the facts and in the circumstances of the case, the Appellate Tribunal was right in law in holding that the Assessing Officer is justified in thrusting the claim of depreciation with respect to machineries purchased for 100% E.O.U. unit ? and

(iv) Whether on facts and circumstances of the case, the Appellate Tribunal was right in holding that the appellant is not entitled to allowance under Section 80M with respect to inter corporate dividends ?"

2. Heard Mr.J.Bala Chander, learned counsel for the appellant and Mr.M.Swaminathan, learned Senior Standing Counsel for the Department.

3. For the assessment year 1992-93, the appellant company filed its return of income on 29.12.1992 admitting a total income of Rs.54,11,870/-, after claiming exemption under Section 80M in a sum of Rs.30,00,659/-. But, the claim under Section 80M was allowable only if the gross total income was positive. The gross total income of the assessee for the assessment year 1992-93 was not positive and hence, the claim made under Section 80M was obviously wrong.

4. The Assessing Officer processed the return of income under Section 143(1)(a) and after making some prima facie adjustments, determined the total income as Rs.52,26,120/-. The intimation under Section 143(1)(a) was sent on 22.6.1993. Thereafter, the Assessing Officer revised the intimation of assessment, by an order passed under Section 154, on the ground that the claim under Section 80M was wrongly allowed. While passing the said order, the Assessing Officer also levied additional tax under Section 143(1A).

5. Thereafter, a notice was issued on 22.8.1994 under Section 143(2) for disallowing deduction claimed under Section 80M. There were also other issues covered by the notice dated 22.8.1994, but we are not concerned about those issues in this appeal. In reply to the said notice, the appellant/ assessee filed a letter dated 6.9.1994 seeking to withdraw the claim of depreciation with respect to the additional machinery installed for the 100% export oriented unit. Obviously, the appellant/assessee was constrained to send such a letter instead of filing a revised return, in view of the fact that

the intimation under Section 143(1)(a) had already been completed and also an order under Section 154 had already been passed.

6. The Assessing Officer did not allow the request of the appellant for withdrawal of the depreciation. Therefore, the appellant filed appeals before the Commissioner of Income Tax (Appeals). There were actually seven appeals, covering various assessment years.

7. In so far as the claim of the appellant for withdrawing the depreciation is concerned, that was the subject matter of I.T.A.No.758/94-95. The Commissioner of Income Tax (Appeals) concurred with the Assessing Officer and dismissed the appeals, after holding that the decision of the Supreme Court in ***C.I.T. Vs. Mahindra Mills [243 ITR 53 (SC)],*** was not applicable to his case.

8. Aggrieved by the common order passed by the Commissioner of Income Tax (Appeals), the Revenue filed two appeals and the assessee filed six appeals before the Income Tax Appellate Tribunal. All these appeals were taken up together for disposal by the Tribunal. Out of them, the issue relating to the withdrawal of the depreciation was the subject matter of appeal in I.T.A.No.1615/Mds/2003. The Tribunal upheld the views of the Assessing Officer and the Commissioner of Income Tax (Appeals) on the ground that the assessee ought to have filed a revised return and that they could not have taken a different route merely because the same could not be filed after an order was passed under Section 154. Hence, the assessee is before us.

9. Heavy reliance is placed upon the decision of the Supreme Court in *Mahindra Mills.* In the said case, the Supreme Court was concerned, as rightly pointed out by the Commissioner of Income Tax (Appeals), with a case where a revised return was filed. The Court held that the provision for the claim of depreciation is certainly for the benefit of the assessee and also after pointing out that if they did not wish to avail of that benefit for some reason, the benefit cannot be forced upon them. The Supreme Court eventually held that if the revised return is a valid return and if the assessee has withdrawn the claim of depreciation, it cannot be granted relying upon the original return. Therefore, the said decision was rightly distinguished by the Commissioner of Income Tax (Appeals) as well as the Tribunal.

10. It is to be pointed out that every person, of the description indicated in Clause (a) or (b) of Sub-Section (1) of Section 139, is obliged to furnish a return of his income. The form, in which, such return is to be filed, is also prescribed by the Rules. Sub-Section (5) of Section 139 entitles a person, who has already furnished a return under Sub-Section (1) or who has furnished a return in pursuance of a notice under Section 142(1), to file a revised return at any time before the expiry of one year from the end of relevant assessment year or before the completion of assessment, whichever is earlier. But, this entitlement is circumscribed by the condition that he should have discovered a omission or a wrong statement contained in the original return.

11. The claim of the assessee in this case is not that there was any omission nor that there was any wrong statement.

12. What had actually happened in this case was that the assessee showed a positive gross total income, after claiming the benefit under Section 80M. Once the benefit under Section 80M was withdrawn, the gross total income became negative. They claimed exemption under Section 80M. Once it was withdrawn and the withdrawal of Section 80M was accepted by the assessee to be correct, the total loss went up.

13. Therefore, in order to show a gross positive income, the assessee wanted to withdraw the depreciation that they had claimed earlier. If the assessee had been allowed to withdraw the claim for depreciation in respect of anything that they claimed, the result would have been a positive gross total income. In other words, what the assessee was not entitled to do under Section 139(5) was what the assessee wanted to do by giving a letter. This is why the Commissioner as well as the Tribunal distinguished the decision in *Mahindra Mills.*

14. Relying upon the decision of the Supreme Court in ***C.I.T. (Addl.) Vs. Gurjargravures P. Ltd. [111 ITR 1 (SC)],*** which was cited with approval by a Bench of the Bombay High Court in ***C.I.T. Vs. Pruthvi Brokers and Shareholders P. Ltd. [349 ITR 336 (Bombay)],*** it is contended by Mr.J.Bala Chander, learned counsel for the appellant/assessee that if there are several factors justifying the raising of a new plea in an

appeal, neither the Assessing Officer nor the First Appellate Authority nor the Tribunal could shut the doors for the assessee. In other words, the contention of the learned counsel for the appellant is that if a person is entitled, in law, to a benefit and if he makes a claim for that benefit, the same should not be deprived either on the ground that it was not raised at the earliest point of time or that it was not raised in an appropriate manner.

15. But, we do not think that the said contention is correct. As a matter of fact, the fundamental principles, on which, the Supreme Court decided *Gurjargravures,* form the very basis for Sub-Section (5) of Section 139. It is only to help people, who have omitted to take note of a benefit or who have omitted to make a claim, that a provision has been made, circumscribed of course by a period of limitation and the conditions subject to which, it could be made.

16. To extend the principles indicated in *Gurjargravures* to a case of this nature would mean that all claims made by assessees could be kept as a floating mass allowing the assessees to make the claim, withdraw the claim, reclaim and recline at any point of time. That is not permissible in law and that is not laid down in *Gurjargravures.*

17. To the same effect is yet another decision of the Supreme Court in ***National Thermal Power Co. Ltd. Vs. C.I.T. [229 ITR 383 (SC)].*** But, a look at the facts, out of which, the said decision arose, would steer clear of any doubt. In that case, the assessee had invested its funds on short term

deposits with banks. The interest received on such deposits was offered by the assessee for tax assessment. The assessment was completed on that basis. Subsequently, there was an appeal to the Commissioner of Income Tax and an appeal to the Income Tax Appellate Tribunal. During the pendency of the appeal before the Tribunal, the assessee gave a letter, objecting to the inclusion of the said amount, in the total income. It was contended that on an erroneous admission, no income can be included in the total income. But, when the matter went to the Supreme Court, the question of law that the Supreme Court was concerned was whether a question of law not raised before the authorities, which bears on the tax liability of the assessee, could be examined by the Tribunal or not. Answering the question in favour of the assessee, the Supreme Court held that the Tribunal has jurisdiction to examine a question of law that arises from the facts as found by the authorities.

18. We are at a loss to understand as to how the said judgment could be taken advantage of by the appellant. A pure and simple question as to whether one item could be included in the total income or not, has to be decided on the application of a particular provision. It stands on a different footing from a benefit available to an assessee. If a benefit is available to an assessee and if the assessee has an option to avail the benefit or not, his decision not to avail the benefit stands on a different footing from a pure and simple question of law as to whether an item would constitute an income or

not. Hence, we are of the considered view that the questions of law are to be answered against the appellant/assessee.

19. Accordingly, the tax case appeal is dismissed.

14.10.2015

To
1.The Deputy Commissioner of Income Tax, Virudhunagar.
2.The Income Tax Appellate Tribunal, Chennai 'C' Bench.

RS

V.RAMASUBRAMANIAN,J
AND
T.MATHIVANAN,J

RS

T.C.A.No.2249 of 2006

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