IN THE HIGH COURT OF BOMBAY AT GOA

TAX APPEAL NO. 70 OF 2015

THE COMMISSIONER OF INCOME TAX,
PANAJI., ... Appellant

Versus

SALGAOCAR MINING INDUSTRIES PVT.
LTD., ... Respondent

Ms. Asha A. Desai, Advocate for the appellant.
Shri P.J. Pardhiwalla, Senior Advocate with Advocate Ashwin D. Bhobe for the respondent.

Coram:- F. M. REIS &
NUTAN D. SARDESSAI, JJ.

Date:- 2nd May, 2016

P.C.

Heard Ms. Asha A.Desai, learned Advocate appearing for the appellant and Shri P.J. Pardhiwalla, learned Senior Advocate appearing for the respondent.

2] The learned counsel appearing for the appellant has raised the following contention for consideration in the above appeal under Section 260 A of the Income Tax Act, 1961:

(A) Whether in law and in circumstances of the case, the Hon'ble ITAT is right in deleting the addition made by AO of Rs. 37,56,939/- on account of Dredging and cleaning charges by considering these expenses as revenue as against capital expenses, by ignoring the decisions of the Hon'ble Supreme Court in the case of Commissioner of Income Tax v/s Saravana Spinning Mills Pvt. Ltd. (SC) 293 ITR 2011?

(B) Whether in law and circumstances of the case, the Hon'ble ITAT is right in deleting the addition of Rs. 35,89,64,088/- relating to capital expenditure incurred in ship renovation viz MV Sunrise, by ignoring the decisions of the Hon'ble Supreme Court in the case of Commissioner of Income Tax V/s Saravana Spinning Mills Pvt. Ltd., (SC_293 ITR 2011?

3] The learned counsel appearing for the appellant submits that the findings of the learned Tribunal that the expenditure to the tune of Rs.37,56,939/- spent by the respondent towards Dredging and clearing charges are revenue expenditure are erroneous, as according to the learned counsel, such expenditure are capital expenditure. The learned counsel has thereafter taken us through the findings of the Assessing Officer to point out that on the basis of the material on record such expenditure must be treated as capital expenditure. The learned counsel has thereafter taken us through the findings of CIT as well as Income Tax Appellate Tribunal to point out that the relevant aspects had not been considered by the Tribunal while erroneously coming to the conclusion that such expenditure was revenue expenditure. The learned counsel as such points out that the substantial question of law on that count deserves to be consideration for this Court.

4] With regard to the second proposed substantial question of law, the learned counsel points out that the Assessing Officer has on the basis of the material on record come to the conclusion that new asset has been created issuing expenditure to the old ship i.e. M.V.Sunrise. The learned counsel further points out that the Assessing Officer has found that by replacing the parts of the ship, altogether new asset has been created and as such treated such expenditure to be capital expenditure. The learned counsel, however, submits that the Commissioner of Income Tax as well as the Income Tax Appellate Tribunal have failed to examine the nature of the expenditure while coming to its conclusion that the expenditure was not capital expenditure. The learned counsel further points out that the expenditure which has been incurred exceeds the value of the ship and as such this itself is an indication that a new asset has been created. The learned counsel has taken us through the finding of the learned Tribunal to point out that the findings are erroneous and perverse as according to the learned counsel, the learned Tribunal has failed to consider that on the basis of such expenditure, a new asset has been created.

5] Shri Pardhiwalla, the learned Senior Counsel appearing for the respondent has pointed out that subject assessment in the present appeal is for the year 2008-2009 and that, in the previous assessment year 2006-2007 similar expenditure has been treated as revenue expenditure. The learned Senior Counsel further points out that an appeal preferred against the decisions of Tribunal for the assessment year 2006-2007 has been dismissed by this Court by the order dated 16th November, 2014. The learned counsel as such points out that the learned Tribunal was justified to rely upon such finding while examining similar expenditure for the assessment year 2006-2007 to come to the conclusion that such expenditure was towards revenue expenditure.

6] With regard to the proposed second substantial question of law, the learned Senior Counsel appearing for the respondent has pointed out that both the authorities have concurrently found that such expenditure is the revenue expenditure. The learned counsel further points out that even examining the nature of the expenditure referred to in the impugned orders passed by the Tribunal, it clearly shows that such expenditure are not towards capital expenditure and as such the authorities are justified to come to the conclusion that the expenditure was towards revenue expenditure. The learned Senior Counsel further points out that there is a categorical finding of the Tribunal to the effect that no new asset has emerged from the replacement of the parts and as such the contention of the learned counsel appearing for the appellant that such findings are perverse, are not at all justified. The learned Senior Counsel in support of his submission relied upon, the judgment of the Division Bench of this Court in the case of Commissioner of Income Tax Vs. Chowgule and Co.Pvt. Ltd [(1994) 62 CCH 0807 MumbHC].

7] We have considered the submissions of the learned counsel appearing for the respective parties. As far as the first proposed question for consideration it is undisputed that in similar circumstances, and the identical expenditure for the assessment year 2006-2007, the appeal preferred by the revenue came to be dismissed. The learned Tribunal while coming to the conclusion that the expenditure towards dredging is Revenue expenditure has also relied upon the earlier findings rendered at in earlier assessment year 2006-2007. Considering that the appeal preferred by the Revenue has been rejected, we find that there is no reason to take a contrary view in the present appeal. Both the authorities have concurrently found that such expenditure is revenue expenditure and such concurrent finding of fact cannot be re-appreciated by this Court in an appeal under Section 260 A of the Income Tax Act unless perversity is shown in such findings by the appellant.There is no perversity discussed by the appellant and as such we find that the question of considering the appeal on the proposed question of law would not arise.

8] With regard to the second proposed substantial question of law, we find that both the authorities below upon appreciating the evidence on record have concurrently found that such expenditure is revenue expenditure. There is a categorical finding arrived at by the Tribunal that there is no new asset created upon the replacement of the parts of the concerned ship. The learned Tribunal has also referred to the test required to consider whether an expenditure is revenue expenditure. In such circumstances, we find that this concurrent finding of fact cannot be interfered with by this Court in the present appeal under Section 260 A of the Income Tax Act. The Division Bench of this Court in a judgment in the case of Commissioner of Income Tax reported in Commissioner of Income Tax Vs. Chowgule and Co.Pvt. Ltd.[((1994) 62 CCH 0807 MumbHC] in similar circumstances, has observed at paragraphs 7,9 and 10 read thus:-

"7. Section 31 of the Act provides for deduction in respect of amounts paid on repairs of machinery, plant, etc. It reads:

"31. Repairs and insurance of machinery, plant and furniture. - In respect of repairs and insurance of machinery, plant or furniture used for the purposes of the business of profession, the following deductions shall be allowed -

(i) the amount paid on account of current repairs thereto;

(ii) the amount of any premium paid in respect of insurance against risk of damage or destruction thereof."

"9. It may also be expedient at this stage to consider the relevance of the original cost of the asset vis-a-vis the expenditure on repairs to determine whether it is a revenue expenditure on "current repairs" or expenditure of capital nature. In the instant case, the Commissioner held the expenditure not to be a revenue expander on current repairs in view of the fact that the amount of expenditure on repairs together with the written down value of the ship exceeded its original cost. This, in our opinion, is not the correct approach to determine the nature of the expenditure. The original cost of the ship or machinery or plant is not indicative of its value at the time when the repairs were undertaken. If the value of the machinery or plant or the ship is a relevant factors in deciding whether the repairs amounted to current repairs or results in an addition to or improvement of the existing asset, it would be the "replacement value" and not the "original cost". It is common experience that the replacement value of an asset is often much higher than the original cost-some-times so high that the figure of the original cost loses its relevance. For example, the original cost of an Ambassador car in the mid-seventies was around Rs. 28,000. If such a car was used for business, it written down value after few years of purchase would be insignificant. Repairs under taken on such car might often involve expenditure of an amount much higher than the original cost of the car itself. But that cannot be a factor to hold the expenditure to be an expenditure of capital nature. The "replacement value" of an asset might, however, at times throw some light on the true nature of the expenditure on repairs. Turning to the same illustration of an Ambassador car, the replacement cost of the motor car at present is over Rs. 2,00,000. An expenditure of Rs. 50,000 to Rs. 75,000, on repair of such car cannot be said to bring into existence a new car or result in an addition to such car, though such expenditure evidently is more than double the original cost of the car. Expenditure on repairs and replacement, therefore, cannot be held to be an expenditure of capital nature considering the magnitude of the amounts spend vis-a-vis the original cost of the asset."

10. The propositions that emerge from the above discussion may be summed up thus :

(i) The amount should be paid on account of current repairs.

(ii) "Current repairs" means repairs undertaken in the normal course of user for the purpose of preservation, maintenance or proper utilisation or for restoring it to its original condition.

(iii) "Current repairs" do not mean only petty repairs or repairs necessitated by wear and tear during the particular year.

(iv) Such repairs should not bring into existence nor obtain a new or different advantage.

(v) Neither the quantum of expenditure nor the fact that in the process of repairs, there was substantial replacement of the parts of the machine or ship, is decisive of the true nature of the expenditure.

(vi) The original cost of the asset is not at all relevant for ascertainment the true nature of the expenditure on repairs.

(vii) The replacement cost of the asset may, however, at times be used as an indicator of the true character of the expenditure. If the expenditure on repairs added to the written down value or disposal value exceeds the replacement cost of the asset, a presumption is possible that it is not a revenue expenditure but expenditure of capital nature. Such a presumption, of course, would be rebuttable.

(viii) The expression "current" preceding "repairs" appears to have been used by the Legislature with a view to restricting the allowance to expenditure incurred for preservation and maintenance thereof in its current state in contradistinction to that incurred on any improvement or an addition thereto."

9] Considering the said observations in paragraph 10 and applying the ratio laid down therein to the facts of the present case, we find that in view of the categorical finding arrived at by the authorities below that there was no new asset created pursuant to the replacement of the parts of the ship there are no new circumstances disclosed by the appellants to reexamine the findings arrived at by the learned Tribunal. As such there are no substantial questions of law in the present appeal as the issues raised stand concluded by the said judgment.

10] In view of the above, we find no merit in the appeal and it is accordingly dismissed.

NUTAN D. SARDESSAI, J. F. M. REIS, J.

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