In the High Court of Judicature at Madras

Dated : 23.2.2016

Coram :

The Honourable Mr.Justice V.RAMASUBRAMANIAN

and

The Honourable Mr.Justice N.KIRUBAKARAN

Tax Case Appeal No.823 of 2007

M/s.Ramco Industries Ltd.,
Rajapalayam. ...Appellant

Vs

The Deputy Commissioner of Income
Tax, Special Range-I, Madurai. ...Respondent

TAX CASE APPEAL under Section 260A of the Income Tax Act, 1961 against the order dated 12.2.2002 made in ITA.No.1198/Mds/93 on the file of the Income Tax Appellate Tribunal 'B' Bench for the assessment year 1989-90.

For Appellant : Mr.P.J.Rishikesh
For Respondent : Mr.M.Swaminathan

Judgment was delivered by V.RAMASUBRAMANIAN,J

The above tax case appeal was filed by the assessee raising the following six substantial questions of law :

> *"(1) Whether the Tribunal is correct in sustaining the disallowance of guest house expenses in terms of Section 37(3) of the Income*

Tax Act?

(2) Whether the Tribunal is right in sustaining the said disallowance without noticing the provisions of Section 30 of the Act ?

(3) Whether the Tribunal is correct in sustaining the action of the Lower Authorities in disallowing the foreign tour expenses of Sri Rama Raja ?

(4) Whether the Tribunal is correct in rejecting the claim on the ground of extra commercial consideration without noticing the provisions of Section 37(1) of the Act ?

(5) Whether the Tribunal is right in sustaining the disallowance of excise duty on finished goods and customs duty of closing stock amounting to Rs.15,71,671/- ? and

(6) Whether the Tribunal is right in sustaining the above disallowance in spite of the reversal of the earlier orders of the Tribunal by the Special Bench reported in (1994) 206 ITR 96 (Income Tax Appellate Tribunal - Delhi Bench 'B' Special Bench) (Indian Communication Network Vs. I.A.C. of I.T.)?"

2. However, by an order dated 24.9.2007, this Court admitted the appeal only on questions of law Nos.5 and 6.

3. Heard Mr.P.J.Rishikesh, learned counsel for the appellant and Mr.M. Swaminathan, learned Standing Counsel for the Department.

4. Question Nos.5 and 6 revolve around a claim made by the assessee to the extent of Rs.15,71,671/-, representing the excise duty paid on finished goods and customs duty of closing stock. The same was disallowed on the ground that Section 43B is not attracted.

5. At the time when the assessment was completed and also at the time when the Commissioner of Income Tax (Appeals) decided the appeal, the law was in favour of the Department. Therefore, before the Commissioner of Income Tax (Appeals), the assessee themselves did not press this point, as seen from paragraph 3.6.1 of the order of the Commissioner of Income Tax (Appeals) dated 11.2.1993. Nevertheless, the assessee raised the same ground before the Tribunal, which answered this issue against the appellant, in paragaphs 9 and 10 of its order dated 12.2.2002, following the decisions of the Tribunal in respect of the earlier assessment years on the very same question.

6. However, it is admitted that today, the law on the question of disallowance of the excise duty paid on finished goods and the customs duty paid on closing stock under Section 43B is covered in favour of the assessee, by virtue of the decision of the Supreme Court in ***Berger Paints (India) Limited Vs. C.I.T. [266 ITR 99],*** which was followed by this Court in ***C.I.T. Vs. Ashok Leyland Limited [294 ITR 380]***. Hence, questions of law Nos.5 and 6 are liable to be answered in favour of the assessee.

7. However, Mr.M.Swaminathan, learned Standing Counsel for the Department raised a preliminary objection as to how the assessee could raise questions of law Nos.5 and 6, after having given them up before the Commissioner of Income Tax (Appeals), which is also recorded in paragraph 3.6.1 of the order of the Appellate Commissioner.

8. It is true that the appellant/assessee did not press these questions before the Commissioner of Income Tax (Appeals). Nevertheless, the assessee raised these questions before the Tribunal. The Tribunal did not reject these questions on the ground that the assessee did not press these questions before the Appellate Commissioner. On the contrary, the Tribunal decided these questions on merits. Therefore, the Department should be taken to have given up this objection before the Tribunal and cannot raise it now before this Court.

9. The next objection taken by Mr.M.Swaminathan, learned Standing Counsel for the Department is that Section 43B would apply only in cases where payment of duty has actually been made. It is his contention that there was no proof of the assessee having made such a payment.

10. In response, it is stated by Mr.P.J.Rishikesh, learned counsel for the assessee that the very claim for disallowance was made only because payment had been made. If no payment had been made, the question of claiming disallowance under Section 43B would not have arisen.

11. A look at the orders of the three Authorities would show that there is no indication in any of the orders as to whether the actual payment had been made by the appellant/assessee or not. Therefore, we think that it would be appropriate to send the matter back to the Assessing Officer for finding this fact out, if the questions of law are to be answered in favour of the assessee.

12. Accordingly, the tax case appeal is allowed, the questions of law Nos.5 and 6, on which, the appeal was admitted, are answered in favour of the assessee/appellant. The Assessing Officer shall find out if actually the payment had been made. If actually the payments had been made, the assessee would be entitled to the benefit of disallowance under Section 43B. No costs.

23.2.2016

Internet : Yes

To
1.The Deputy Commissioner of Income Tax, Special Range-I, Madurai.
2.The Income Tax Appellate Tribunal 'B' Bench.

RS

V.RAMASUBRAMANIAN,J
AND
N.KIRUBAKARAN,J

RS

TCA.No.823 of 2007

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