

Andreza

IN THE HIGH COURT OF BOMBAY AT GOA

TAX APPEAL NO. 7 OF 2004

The Commissioner of Income Tax

Having office at Aayakar,

Bhavan Patto, Plaza,

Panaji – Goa.

Appellant

~ V E R S U S ~

M/s Auto Mobile Corporation of Goa Ltd.,

Honda, Sattari, Goa.

...Respondents

APPEARANCES

For the Appellant

***Ms Amira A. Razaq, Standing
Counsel***

For the Respondents

Mr J. Supekar, Advocate

***CORAM: N. M. Jamdar &
Nutan D. Sardesai, JJ***

DATED: 1st November 2017

ORAL JUDGMENT (per N.M. Jamdar J):

1. This Tax Appeal filed by the Revenue through the Commissioner of Income Tax, seeks to call in question the order by the Income Tax Appellate Tribunal, Panaji Bench on 27th January 2004 in ITA no.1113-4/PN/95.

2. The Assessee is a Company registered under the Companies Act, 1956. The Assessee-Company is engaged in the business of fabrication of automobiles parts. The Assessee filed its return on

31st December 1990, declaring its total income under Section 115J of the Income Tax Act at ₹44,91,314/-. Another Return was filed on 17th July 1991 making some adjustment to the total income and changing the same to ₹45,91,314/-. The Returns were taken up for scrutiny by the Assessing Officer under Section 143(1)(a) of the Income Tax Act (*the Act*). Before the Assessing Officer, the question of depreciation arose for consideration. The Respondent-Assessee claimed that it had not claimed depreciation even though the assets were put in use during the year. The Assessing Officer disagreed with the contention of the Respondent-Assessee and held that under the Block of Assets Concept and in view of the decision of the Apex Court in *Saharanpur Electrical Supply Company Ltd., vs CIT*¹, there is no option with the Assessee not to claim depreciation and therefore disallowed the case of the Respondent-Assessee and took the depreciation into consideration. The Assessing Officer thereafter determined the total income of the Respondent-Assessee at Rs.44,91,314/- and passed an order accordingly.

3. The Respondent-Assessee filed an Appeal ITA No.154/PNJ/92-93 before the Commissioner of Income Tax (Appeals). The main contention of the Respondent-Assessee, relevant for the purpose of the present Appeal was that the

¹ 194 ITR 294

Assessee has an option whether to claim depreciation or not, and depreciation cannot be thrust upon the Assessee by the Assessing Officer *suo motu*. Decision of this Court in *CIT vs Sri Someshwar Sahnkari Sakhar Karhana Limited*² was relied upon. The Commissioner of Income Tax Appeals accepted this contention and held that it was the choice of the Assessee whether to claim depreciation or not and accordingly the Commissioner allowed the Assessee's appeal by Order dated 8th September 1995.

4. The Revenue filed an Appeal before the Income Tax Appellate Tribunal Panaji Bench, Goa. Before the Tribunal, the case of the Revenue was based on the depreciation aspect alone. The Tribunal decided the controversy in the following words:

“28. Learned Counsel for the assessee submits that this issue is now covered in favour of the assessee by the judgment of the Hon'ble Supreme Court in the case of CIT Vs Mahendra Mills (243 ITR 56) wherein their Lordships have, inter alia, held that “the Assessing Officer cannot grant the depreciation allowance when the same is not claimed by the assessee.” On the other hand, learned Departmental Representative placed his reliance on the judgment of the Hon'ble Bombay High

Court in the case of Indian Rayon Corporation Limited vs CIT (261 ITR 98). On carefully going through these judgments, we find that the judgment of Hon'ble Bombay High Court in Indian rayon's case (supra) does not come in conflict with the Hon'ble Supreme Court's judgment in the case of Mahendra Mills (supra) in as much as the issue there was computation of deduction under section 80HH and without disturbing the proposition laid down in Mahendra Mills case. The CIT(A) therefore rightly reversed the action of the Assessing Officer in this regard, and held that, as per the law then in force, the depreciation could not have been thrust on the assessee. In this view of the matter, we approve the conclusions arrived at by the CIT(A) and decline to interfere in the matter.”

With this reasoning, the Tribunal dismissed the appeal of the Revenue by Order dated 27th January 2004. Thereafter, the present Appeal has been filed by the Revenue under Section 260 of the Act.

5. The Appeal was admitted by this Court on 12th July 2004 on the following questions of law :

“A) Whether on the facts and circumstances of the case, the finding of the ITAT holding that the depreciation u/s

32(1) could not have been thrust on the assessee based on the decision reported in “243 ITR 56” is applicable to the facts of the case, is contrary to law, particularly, in view of amendment to the Income Tax Act, with effect from 1.4.1988, deleting section 34 of IT Act ?

C) Whether the decision of the Hon'ble Bombay High Court in the case of “CIT vs. Gannon Dunkerly and Company Pvt. Ltd.,” is applicable in the facts and circumstances of the case ?”

6. When the Appeal came up for final hearing, it was urged on behalf of the Respondent-Assessee that the Tax effect, which forms subject matter of the Appeal, is ₹1,47,340/-, which is less than ₹2,00,000/- and, therefore, in view of the view taken by this Court as well as the circulars of the Central Board of Direct Taxes of not pursuing Appeals where tax amount was less than ₹2,00,000, the Appeal is not maintainable. The Division Bench (*Karnik & Reis, JJ*) accepted this contention and disposed of the Appeal by order dated 25th August 2010. The Appellant-Revenue filed a Review Application No.26 of 2010. The Review Application was rejected on the ground that it is not maintainable. A Special Leave Petition No.10603-10604/2014 was filed by the Appellant-Revenue in the Apex Court. In Special Leave Petition, in the affidavit, one of the ground raised by the

Appellant-Revenue was that since the Respondent-Assessee falls within the ambit of Section 80HH of the Act, being newly established Industrial unit, and thus there was no option available for the Respondent-Assessee not to claim depreciation, and having not claimed depreciation, it had earned notional income, which was far in excess of ₹20,00,000/-, which was the limit fixed by the CBDT by the subsequent circulars. The Apex Court disposed of the Appeal by the following order:

“1. Leave granted.

2. The High Court by the order dated 25th August, 2010 has disposed of the appeal filed by the Revenue without entering into the merits on the ground that the tax demand which forms the subject matter of the appeal is less than Rs.2,00,000/- (Rupees two lakh). Thereafter, the High Court by the order dated 28th March, 2012 has dismissed the Review Petition filed by the Revenue holding the same to be not maintainable against the order passed under the provisions of Section 260A of the Income Tax Act, 1961.

3. Before this Court, an affidavit has been filed by the Revenue explaining how the notional tax effect is far beyond the amount of Rs.2,00,000/- (Rupees two lakh). Moreover, in Commissioner of Income Tax Vs. Meghalaya Steels Ltd.,

decided on 5th August, 2015, a view has been taken by this Court that the review would be available in respect of the orders passed under Section 260A of the Income Tax Act, 1961.

4. In view of the above, we allow the appeals and set aside both the orders dated 25th August, 2010 and 28th March, 2012 passed by the High Court in Tax Appeal No. 7 of 2004 and Civil Application (Review) No. 26 of 2010 respectively and request the High Court to decide the review petition and thereafter the appeal itself, if so required, on merits. We also make it clear that we have expressed no opinion on the merits of any of the contentions of the parties.

*C. A. NOS. 2013-2014 OF 2016
(@SLP(C) NOS. 10603-10604/2014]*

5. Leave granted.

6. In view of the order passed above in civil appeals arising out of Special Leave Petition (Civil) Nos.18119-18120/2013, these appeals are also disposed of in the similar terms.”

7. The Review Application, which was restored, was accordingly heard by the Division Bench (*Reis & Sardesai, JJ*) and the same was allowed by Order dated 29th March 2017. All contentions of the parties on merits as well as arguments with reference to the subsequent circular No.21 of 2015 of CBDT

were kept open. The Appeal is thus placed for final hearing before us.

8. Ms. Razaq, the learned Counsel for the Appellant has tendered an additional substantial question of law. We have heard Mr Supekar, the learned Counsel for the Respondent on the request made by the learned Counsel for the Appellant-Revenue for framing an additional question of law.

9. For the purpose of appreciating the request of the Revenue for framing an additional question of law, we refer to Section 260(4) of the Act, which reads thus :

“260 (1) ...

(2) ...

260A. Appeal to High Court.- (1) An appeal shall lie to the High Court from every order passed in appeal by the Appellate Tribunal before the date of establishment of the National Tax Tribunal, if the High Court is satisfied that the case involves a substantial question of law.

(2) ...

(a) ...

(b) in the form of a memorandum of

appeal precisely stating therein the substantial question of law involved.

(2A) ...

(3) Where the High Court is satisfied that a substantial question of law is involved in any case, it shall formulate that question.

(4) The appeal shall be heard only on the question so formulated, and the respondents shall, at the hearing of the appeal, be allowed to argue that the case does not involve such question :

Provided that nothing in this sub-section shall be deemed to take away or abridge the power of the court to hear, for reasons to be recorded, the appeal on any other substantial question of law not formulated by it, if it is satisfied that the case involves such question.

(5) ...

(6) ...

(7) ...

The proviso to sub-section(4), thus confers power on the Court to hear, for the reasons to be recorded, the Appeal on any other question of law not formulated by it, if the Court is satisfied that such a question arises. Therefore, the existence of power of this Court to frame an additional substantial question of law is not in dispute. The reasons why we are indicated in the body of this decision hereinafter.

10. We, therefore, frame the additional question of law as under:

“Whether the Assessee can disclaim depreciation, when it has claimed special deduction under Section 80HH of Chapter VI-A of the Act ?”

11. It is the contention of Ms Razaq for the Revenue that in the case of *Indian Rayon Corporation Limited vs CIT*³, the Division Bench of this Court after interpreting the provisions of Section 80HH of the Act has categorically laid down that if an unit falls within the ambit of Section 80HH of the chapter VI A of the Income Tax Act and enjoys certain benefits from imposition of tax then it has no option not to claim depreciation. The reliance was also placed on the decision of the Full Bench of this Court in *Plastiblends India Ltd. Vs Additional Commissioner of Income Tax*⁴ and of the Apex Court in *Plastiblends India Ltd. Vs Additional Commissioner of Income-tax*⁵. This is the main contention advanced by the Revenue before us. As a corollary, it was contended that this aspect of the matter has not been considered by the Tribunal at all and it clearly arose for consideration. It was also contended that from the

3 261 ITR 98

4 [2009] 185 Taxman 187 (Bombay)

5 [2017] 86 taxmann.com 137 (SC)

subsequent amendments to Section 32 of the Act, more particularly by the fifth explanation, it is clear that the object of the legislature is to curb the practice of not claiming depreciation during the tax holiday period, and that even the general law has undergone a change since the year 2002. It was contended that the Returns filed by the Respondent-Assessee itself on 31st December 1990 and revised the return filed on 17th July 1991, make it clear that the Respondent-Assessee falls within the ambit of Chapter VI-A of the Act.

12. Mr. Supekar for the Assessee submitted that it was never the case of the Revenue that the Assessee falls with the Section 80HH of the Act and that its claim for depreciation must be construed under the said provision. He submitted that it was the case of the Revenue that the Respondent-Assessee is not entitled to claim depreciation under the general provisions dealing with depreciation under Section 32, which was rightly negated by the Tribunal, as at that point of time there was an option available to an Assessee not to claim depreciation.

13. We have considered the rival contentions. We are of the opinion that the correct course of action is to remand the proceedings to the Tribunal. The two factors persuade us to take this course of action, that is to frame the above additional question

of law and send the same for consideration of the Tribunal both on factual as well as legal aspects. Firstly, factor is that, *prima facie*, we find that in the Return of income of the Assessee, there is an indication that the Respondent-Assessee has treated itself to be an entity covered under Section 80HH of the Act. Secondly, we cannot be oblivious of the fact that when the order disposing of the present Appeal by the Division Bench was challenged by the Revenue in the Apex Court, a specific ground was taken by the Revenue in their affidavit regarding the applicability of Section 80HH of the Act. Thereafter, the Apex Court had set aside the order disposing of the Appeal and the matter is being now agitated before us. We do not wish to conclude this factual aspect, but what we wish to reiterate is that it cannot be said that the aspect of applicability of 80HH of the Act was never in contemplation of any of the parties to this litigation. If the factual position is established that the Respondent-Assessee falls within the ambit of Section 80HH of the Act and has taken benefit of certain tax exemption, then question will arise whether law laid down by this Court in the case of *Indian Rayons* will be applicable to the Respondent-Assessee and its case regarding not claiming depreciation could stand.

14. The Division Bench of this Court in *Indian Rayons* has held as under :

“10. ... The argument of the assessee is that in view of the Judgment of the Supreme Court in Mahendra Mill's case (supra), it is open to the assessee not to claim depreciation allowance under section 32 and consequently it is argued that 20% rate of deduction should be applied to Rs.100 in the above illustrations, without taking into account the depreciation. We do not find any merit in this argument. The Scheme of section 4 and section 5 of the Income-Tax Act does indicate that income-tax is a tax in respect of income computed as per the provisions of the Act. There is a distinct dichotomy between cases of computation of normal income under the Act de hors Chapter VI-A and computation of taxable income where the assessee claims the benefit of deduction under Chapter VI-A because the Legislature has intended that these special deductions should be restricted to the profits derived from a newly established undertaking. To give an illustration, export profits under Section 80HHC are required to be restricted to the receipt of foreign exchange. If this object is kept in mind, then it is clear that the analogy of Section 32(2) given by the assessee will not apply in cases where an assessee claims special deduction under Chapter VI-A. The matter can be looked at from another angle. While computing normal income, an assessee may set off depreciation against its gross income. In such cases, depreciation is like any other ordinary expense. However, such

depreciation cannot be equated with special deduction under Chapter VI-A. In any event, in this case, on the facts, the assessee claims depreciation of Rs. 75 from the balance income of Rs. 80 and, therefore, the judgment of the Supreme Court in Mahendra Mills case [2000] 243 ITR 56 has no application.” (Emphasies supplied)

15. Thus, if the factual position is established that the Respondent-Assessee falls within the ambit of Section 80HH of the Act, then the entire complexion of the dispute will change. Therefore, the appropriate course of action would be to quash and set aside the Order passed by the Income Tax Tribunal, Panaji and restore the IT Appeal No.1113/PN/95.

16. Mr Supekar during the earlier hearing had taken a preliminary objection regarding the maintainability of the present Appeal in view of the circular of CBDT dated 10th December 2015 based on the tax effect. However, in view of the decision of the Apex Court in *The Commissioner of Income Tax vs M/s Gemini Distilleries* in *Civil Appeal No.16815/2015* decided on 12th October 2017, the learned Counsel for the parties agree that this objection does not survive any more for the present Appeal. Even apart from this order of the Apex Court, for the purpose of understanding the preliminary objection, we had to consider the merits of the case as the argument of the Revenue is that if the

Respondent-Assessee falls within the ambit of Section 80HH of the Act, then by not claiming deduction has earned notional income far in excess of ₹20,00,000/-. Therefore, the Appeal was heard on merits also.

17. In view of the above discussion, we allow the Appeal by quashing and setting aside the Order passed by the ITAT in Appeal No. 1113/PN/95 dated 27th January 2004. The IT Appeal No.1113/PN/95 is restored to the file of the ITAT for consideration of the additional question that we have framed which would require a factual inquiry as indicated above.

18. We make it clear that the observations made in this Judgment is only to indicate the need for remanding the matter to the Tribunal and are not to be construed as final conclusions on the factual aspects as to whether the Respondent-Assessee falls within the ambit of Section 80HH. If the Tribunal comes to the conclusion that the Respondent-Assessee falls within the ambit of Section 80HH of the Act, then the Tribunal will proceed to consider whether the law laid down by this Court in *Indian Rayons* (supra) has to be made applicable to the Respondent-Assessee.

19. We keep all contentions of the parties, including maintainability, open. Registry to communicate the Order to the Tribunal at the earliest.

Nutan D. Sardesai, J.

N.M. Jamdar, J.