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IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

INCOME TAX APPEAL NO.1250 OF 2014

Commissioner of Income Tax ..Appellant
Versus
M/s. Ganga Developers ..Respondent

....

Mr. Ashok Kotangale a/w Ms. Padma Divakar for the Appellant.
Mr. Riyaz Padvekar i/b. Dave & Padvekar Associates for the Respondent.

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CORAM: M. S. SANKLECHA &
A. K. MENON, JJ.

DATE : 10th JANUARY, 2017

P.C.

1. This Appeal under Section 260-A of the Income Tax Act, 1961 (the Act) challenges the order dated 29th November, 2013 passed by the Income Tax Appellate Tribunal (the Tribunal). The impugned order is in respect of Assessment Year 2004-05.

2. This appeal raises the following question of law for our consideration :-

> *"(i) Whether on the facts and in the circumstances of the case and in law the Tribunal was justified in sustaining the order of the Commissioner of Income Tax (Appeals) (CIT(A)) holding that the rejection of Books of Account in terms of Section 145 of*

the Act was not justified?

(ii) Whether on the facts and circumstances of the case and in law, the Tribunal was justified in upholding the order of the CIT(A) in allowing the expenses of Rs.36,37,375/-?

(iii) Whether on the facts and circumstances of the case and in law, the Tribunal was justified in upholding the order of the CIT(A) allowing 50% of depreciation amounting to Rs.27,59,570/-?

(iv) Whether on the facts and circumstances of the case and in law, the Tribunal was justified in upholding the order of the CIT(A) allowing the loss pertaining to M/s. K Star Hotel at Rs.8,18,327/-?"

3. <u>Regarding question no.(i):-</u>

(a) The Respondent-assessee is in the business of civil construction and Hoteliers. By an Assessment Order dated 29th December, 2006 passed under Section 143(3) of the Act, the Assessing Officer rejects the Books of Account of the respondent-assessee and proceeds to complete the proceedings in terms of Section 144 of the Act. This rejection of Books of Account was on the ground that that there was a change in the method adopted by the assessee to recognize its income from Percentage Completion Method (PCM) to Project Completion Method and that it simultaneously followed different methods to determine its profits on construction of building.

(b) In appeal the Commissioner of Income Tax (Appeals) (CIT(A)) held that in respect of building projects commenced after 31st March, 2000 the respondent-assessee adopted Project Completion Method and the project commenced prior to 31st March, 2000 the Percentage Completion Method was adopted. The same was accepted by the Assessing Officer from Assessment Year 2001-02 onwards and it has been consistently followed. Thus Assessing Officer was not justified in rejecting the Books of Accounts. In the above circumstances, the CIT(A) by his order dated 25th October, 2010 allowed the appeal.

(c) Being aggrieved the Revenue carried the issue in appeal to the Tribunal. By the impugned order the Tribunal on independent examination of the contentions raised by the Revenue upheld the view of the CIT(A) holding that the Assessing Officer was not justified in rejecting the Books of Account.

(d) The only grievance of the Revenue before us is that the Percentage Completion Method of accounting followed by the respondent-assessee resulted in varying profits/income being offered for tax in different assessment years. In support, our attention was invited to page 7 of the Assessment Order.

(e) We are unable to understand the objection urged by the Revenue. The Percentage Completion Method of accounting itself implies that the profit/income offered to tax would depend upon the percentage of a particular project being completed. This would necessarily vary from year to year and there is no requirement that it should be the same percentage year to year. There is no bar in adoption of one method of accounting for one source of income/business and another for the other, so long as it is regularly employed and results in appropriate determination of income.

(f) Thus the grievance raised by the Revenue does not give rise to a substantial question of law. Accordingly question no.(i) is not entertained.

4. <u>Regarding question no.(ii)</u>

(a) The impugned order of the Tribunal upheld the order of the CIT(A) allowing the claim of business expenditure of Rs.36.37 lakhs.

(b) The Assessing Officer as a consequence of the rejection of the Books of Account estimated the profits, and brought it to tax. Thus ignoring the expenditure of Rs.36.67 lakhs which had been claimed by the respondent-assessee in its Books of Account.

(c) In appeal, the CIT(A) held that the rejection of the Books of Account was not justified. This view has been upheld by the Tribunal and we have in response to question no.(i) above refused to interfere with the order of the Tribunal. Therefore Books of Accounts once being accepted then unless it is the case of the Revenue that the expenses claimed are not for the purposes of business or that expenses are bogus, the expenses claimed in the audited accounts have to be allowed. The Assessing Officer was directed to allow business expenditure by reducing the disallowance, if any. In appeal, the Tribunal by the impugned order upheld the finding of the CIT(A).

(d) We find that once the accepted Books of Accounts have been admittedly subjected to audit, then expenses claimed therein have to be allowed. Unless of course, it is the Revenue's case that the expenses were not incurred for the purposes of the business or that the expenses were bogus. Even before us the Revenue does not urge that the expenses claimed were bogus and/or not incurred for the purpose of business.

(e) Therefore in the face of concurrent finding of fact of the CIT(A) and the Tribunal, the question as proposed does not give rise to a substantial question of law. Accordingly, question no.(ii) is not entertained.

5. <u>Regarding question no.(iii) and (iv):-</u>

(a) The impugned order of the Tribunal dismissed the Revenue's appeal from the order of the CIT(A) allowing depreciation in respect of equipment, plant and machinery used in the respondent-assessee's hotel business and also the loss claimed from its Hotel business.

(b) The Assessing Officer had disallowed the claim of depreciation on the ground that the equipment so purchased before 1st October, 2003 while addition was shown to be made after 1st October, 2003. It also held that the Hotel had not been started in the previous year relevant to subject Assessment Year, therefore no loss could be allowed.

(c) In appeal, this respondent-assessee led evidence to show that the hotel business had commenced during the year under consideration and that the assets on which depreciation was claimed was put to use during the previous year relevant to the subject assessment year. The CIT(A) had called for a remand report from the Assessing Officer. In the remand report the Assessing Officer did not dispute material produced by the assessee in support of its claim of starting of business and use of equipments for Hotel business before the CIT(A). In that view of the matter, the CIT(A) held on examination of the evidence that the respondent-assessee had started its hotel business on 17th January, 2004 and the equipment, plant and machinery was used by the respondent in the conduct of its hotel business. Therefore the respondent-assessee was entitled to a claim the loss for the subject Assessment Year and also depreciation to the extent of 50% as it was used for less than 180 days during the year under consideration. In appeal, the Tribunal upheld the finding of the CIT(A) on both the issues.

(d) Before us the grievance of the Revenue as urged by Mr. Kotangale is that the hotel business of the respondent-assessee was not commenced during the previous year relevant to the subject Assessment Year and the equipments on which depreciation was claimed was not used in the subject Assessment Year. However no facts in support of the aforesaid submission has been shown to us.

(e) We note that the Assessing Officer had in the respondent-assessee's appeal before the CIT(A) had filed a remand report. In the remand report no objection was taken to the evidence led by the respondent-assessee to show that the hotel business had commenced from 17th January, 2004 as well as the plant and machinery and equipment have been put to use during the subject assessment year. Thus entitled to depreciation at 50% as only used for less than 180 days.

(f) As the CIT(A) and the Tribunal have come to a concurrent finding of fact that the business is started on 17th January, 2004 and the equipments on which depreciation has been claimed has been used in the running of the hotel business and not shown to be perverse in any manner and the questions (iii) and (iv) as formulated does not give rise to any substantial questions of law. Thus not entertained.

6. In the above view, the appeal is dismissed. No orders as to costs.

(A. K. MENON, J.) **(M. S. SANKLECHA, J.)**

Wadhwa