

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on: 28.11.2016

Pronounced on :12.04.2017

Coram:

The Hon'ble Mr.Justice Nooty Ramamohana Rao

AND

The Hon'ble Dr. Justice ANITA SUMANTH

T.C.A. No.1347 of 2009 &

C.M.P.No.8615 of 2016

M/s.Operating Lease and Hire
Purchase Co.Ltd.,
"Vairams"
112, Thiyagaraya Road,
4th Floor,
T.Nagar,
Chennai-600017

....Appellant

Vs

The Deputy Commissioner of Income Tax,
Company Circle V(1),
Chennai 600034.

...Respondent

सत्यमेव जयते

Prayer: Tax Case Appeal filed under section 260-A of the Income Tax Act, 1961 against the order of the Income Tax Appellate Tribunal "D" Bench, Chennai dated 20.02.20039 in ITA.No.690/Mds/2008 for the assessment year 2004-05, against the order of commissioner of Income Tax (appeals), IX in ITA No.488 of 2006-07 dated 24.01.2008 against the assessment order dated 12.12.2006 by the Deputy Commissioner of Income Tax Company circle V(I), Chennai in PAN/GIR No.AAAC00400D.

For Appellant .. Mr.R.Venkatnarayanan

Mr.Subbaraya Aiyar

For Respondent .. Mr.T.Ravikumar

Sr.Standing Counsel

JUDGMENT

(Judgment of this Court was delivered by ANITA SUMANTH, J.)

This Tax Case (Appeal) is filed by the assessee raising the following substantial questions of law for adjudication:

1. Whether on the facts and in the circumstances of the case the Tribunal was right in law in holding that the Appellant is not entitled to deduction of Bad Debts written off in the books?
2. Whether on the facts on the circumstances of the case the Tribunal was justified in not appreciating that the amount represents money lent in the ordinary course of the business of money lending and hence the same is allowable as bad debt or business loss?
3. Whether on the facts and in the circumstances of the case the Tribunal was right in law in holding that the Appellant is not entitled to claim of Business loss in respect of cancellation of hire purchase agreement the income on which were offered for tax in earlier years and reversed in this year?

2. The appellant is a company engaged in the business of hire purchase and leasing. Pursuant to a return of income filed by the company on 1.11.2004 in relation to AY 2004-2005, the assessment was taken up for completion under scrutiny. Despite the grant of several opportunities, the order of assessment records that there was no compliance and accordingly the assessment was completed setting the assessee exparte. An order of assessment was passed in terms of section 144 of the Income Tax Act (in short the 'Act').

3. The first issue relates to a claim of deduction of bad debts of an amount of Rs.95,84,348/-. The assessing officer called for proof that the amounts claimed as bad debts had been offered to tax in the earlier years in accordance with the provisions of section 36(2) of the Act. Since there was no response, the claim was disallowed.

4. The second issue addressed in assessment was a claim of long term capital loss on the sale of shares. Investments had been made by the assessee in two companies by the names of Carbon Dioxide Limited and Kaymo Finance Private Limited and the shares sold in the previous year relevant to the present assessment year at a loss. Queries were raised at the time of assessment and the assessee filed the details available. The sale was justified on the ground that the investment was in shares of closely held companies, wherein the shares were unlisted and not traded in the market. The companies were loss making and in accordance with the policies and prudential norms of the Reserve Bank of India, investments in loss making companies were to be off loaded. A policy decision was thus taken to dispose of the shares at a nominal value. The claim was however, disallowed on the ground that the transfer of shares was not substantiated.

5. The third Substantial Question of Law relates to a claim of business loss arising out of the cancellation of hire purchase agreement of an amount of Rs.1,91,24,000/-. The assessing officer sought substantiation of the same which was not forthcoming. The loss was thus disallowed on the ground that the claim was not substantiated by way of documentary evidence whatsoever.

6. The order of assessment was carried in appeal before the Commissioner of Income Tax (Appeal), who vide order dated 24.1.2008 rejected the same. The order of the Commissioner of Income Tax (Appeals) is rather cryptic and confirms the order of assessment without much discussion. A further appeal was filed before the Income tax Appellate tribunal which was disposed of, vide order dated 20.2.2009. The claim of bad debts was rejected holding that the assessee had not complied with the provisions of section 36(2) of the Act. To this extent, the order of the tribunal is misconceived for the reason that the embargo placed in section 36(2) would not apply in the case of a non banking financial company which status, the appellant admittedly enjoys. All that remains is to examine if the debt has been written off in accordance with the mandate of section 36(1)(vii) of the Act. We thus remand the matter to the file of the assessing officer for the limited purpose of examining whether the amounts have

been written-off in accordance with the methodology set out by the Supreme Court in *Southern Technologies vs. The Joint Commissioner of Income Tax, Coimbatore* (187 TAXMAN 346) and *Vijaya Bank vs. Commissioner of Income Tax* (190 TAXMAN 257).

Substantial question of Law No.1 is decided in favour of the assessee by way of remand.

7. With respect to the claim of deduction of long term capital loss on sale of shares, the tribunal confirms the view of the lower authorities to the effect that there was no document produced to establish sale of shares. The learned counsel appearing on behalf of the assessee would, at this stage, seek to file additional evidence. He would contend that the documents could not be located earlier on account of unavailability of competent staff at the relevant time. We are not convinced with the justification provided. As rightly pointed out by the learned Senior Standing Counsel for the Revenue, the appeal at the level of the High Court is for the consideration of a substantial question of law on the basis of material on record. The burden of establishing inability to produce evidence at the stage of assessment, first appeal and second appeal lies heavily upon the assessee. Such burden has not been discharged in the present case. The request for admission of additional evidence is hence rejected.

8. A perusal of the balance sheets on record in respect of year ending 31.3.2003 as well as 31.3.2002 would reveal that the investments, while appearing in the balance sheet for the year ending 31.3.2002, are conspicuous by their absence in the relevant previous year. The logical inference to be drawn would be that the shares, have, indeed been sold during the year and we hold accordingly. This brings us to the aspect of valuation of the shares. A query appears to have been raised at the time of assessment seeking details of capital loss suffered along documentary evidence for the same. The assessee produced some details. The sale was justified by pointing out that there had been no profits from the companies since inception and that the shares were neither listed nor traded. The appellant thus decide to off load the same, in line with the prudential norms of the RBI. The assessing authority however rejected the claim stating that the assessee had not substantiated the transfer of shares with evidence. We find that the assessee has furnished the material sought for and available with it such as details of brokers, contract note, date of acquisition and amounts. If the assessing officer was of the view that any further substantiation was required, the same could have well been sought. The error is continued by the Commissioner (Appeals) who dismisses the appeal cursorily in the following terms;

`(iv) I have considered the assessment order, written submissions filed by the appellant. The appellant company has not furnished the details about the sale and transfer of shares. I find that the learned AO has correctly disallowed the loss of Long Term Capital Gains. It is ordered to be confirmed. This ground of appeal is dismissed.'

The Tribunal rejects it in the following terms;

'7. Upon careful consideration we find that the assessee has failed to produce any document to prove that there had in fact been sale of shares which has resulted in the said loss. In the absence of any documentary evidence the claim of loss on sale of shares cannot be allowed. Hence, we uphold the orders of the authorities below on this issue.'

9. We are of the opinion that the matter has not been considered in the proper perspective and neither of the authorities below have appreciated the materials that were produced or afforded an opportunity to the assessee to produce further details if they were of the opinion that the same were required. This issue is thus remanded back to the file of the assessing officer for consideration anew after affording appropriate opportunity to the assessee to produce materials and substantiate its claim. Substantial Question of Law No.2 is allowed by way of remand.

10. Substantial question of law 3 relates to a claim of loss that has been considered by the assessing authority in detail and rejected for want of documentary evidence. The appellant also did not produce any material either before the Commissioner of Income Tax (Appeals) or the tribunal in this regard. In view of the concurrent finding of the authorities to the effect that the claim is wholly unsubstantiated, we do not find any reason to interfere with the conclusion of the tribunal confirming the rejection of the claim. Substantial question of law No.3 stands rejected.

11. The Tax Case (Appeal) is partly allowed in the above terms. No costs. Consequently, the connected miscellaneous petition is closed.

Sd/-
Assistant Registrar

//True Copy//

Sub Assistant Registrar

msr

To

The Deputy Commissioner of Income Tax,
Company Circle V(I), Chennai-34.

+1cc to Mr.Ravi kumar, Advocate, S.R.No.22208

+1cc to Mr.Subbaraya Aiya Padmanabhan, Advocate, S.R.No.22561

T.C.A. No.1347 of 2009 &

C.M.P.No.8615 of 2016

SS (CO)
RS (25/04/2017)

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