IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 23.01.2017

CORAM:

THE HONOURABLE MR.JUSTICE HULUVADI G.RAMESH
&
THE HONOURABLE DR. JUSTICE ANITA SUMANTH

T.C.A.NO.673 OF 2016

Sri Saravanan Mandthiram
No.169, Karaneeshwarar Koil
Pakoda Street, II Floor,
Mylapore, Chennai 600 004. .. Appellant

Vs

The Income Tax Officer,
Business Ward - V(1)
Chennai .. Respondent

Prayer:- Tax Case Appeal filed under Section 260A of the Income Tax Act, 1961 against the order of Income Tax Appellate Tribunal, "A" Bench, Chennai in I.T.A.No.1172/Mds/2014 dated 20.11.2015. against the order of commissioner of Income Tax (Appellats-V) Nungambakkam Chennai-34 in order dated 24/02/2014 in ITA.NO.62/12-13 (A)-V and arising out of the Assessment order of Income-Tax Officer Business-Ward V(1) Chennai-34 order dated 27/12/12 in PAN NO.ALJPM2132M

For Appellant : Mr. S.Sridhar

For Respondent : Mr. J. Narayanasamy

JUDGMENT

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

This appeal filed by the assessee in respect of assessment year 2010-2011 challenges an order of the Income Tax Appellate Tribunal dated 20.11.2015 and raises the following substantial questions of law.

'1. Whether the Appellate Tribunal is correct in law in sustaining the addition of excess depreciation on the wrong presumption of the business of garbage clearing pursued by the appellant as against the business of hiring the trucks establishing the perversity in recording factual findings?

2. Whether the Appellate Tribunal is correct in law in sustaining the disallowance of depreciation on Truck No.4 without making the distinction between the legal ownership and the beneficial ownership especially in the context of Section 32 of the Act and further especially while not disputing the possession and use of the said truck vesting with the appellant herein?

3. Whether the Appellate Tribunal is correct in law in not adjudicating the other issue emanated from the disallowances /additions made in the computation of taxable total income for the Assessment Year 2010-11 by recording perverse findings in para 7 of the impugned order?'

2. We have heard the submissions of Mr.Sridhar appearing for the assessee and Mr. J.Narayanasamy, appearing for the Department.

3. The brief facts involved are as follows:-

(i) At the relevant point in time, the assessee appears to have owned four trucks and was utilizing the same for the collection of garbage. The bone of contention between the assessee and the Revenue is whether the assessee is a contractor for the collection of garbage in which case he was entitled to depreciation on the trucks at the rate of 15% or a contractor hiring out lorries utilised for the collection of garbage through the agency of a third party in which case the entitlement to depreciation was 30%. With respect to truck numbers 2 and 3, the assessing officer was of the view that the activity engaged in was the collection of garbage itself and as such the rate of depreciation that the assessee was entitled to would be 15% against 30% claimed. With respect to truck No.4, the assessing officer noted that the truck was owned by the wife of the appellant and as such the appellant was not entitled to depreciation at all in so far as he was not the owner of the truck, which is a mandatory pre-condition for the claim. Overuling objections of the assessee to the effect that he was in the business of hiring of lorries, the assessment was completed holding that the entitlement to depreciation was 15% only.

(ii) The appeal filed by the assessee before the Commissioner of Income Tax (Appeals) was dismissed vide order dated 24.2.2014 and the same was confirmed by the Income Tax Appellate Tribunal (Tribunal 'in short') by order dated 20.11.2015, which order is assailed in appeal before us.

4. At the time of hearing , we sought clarity on the actual nature of work engaged in by the assessee as the order of the lower authorities were silent in this regard. A copy of a work order was circulated before us. Mr.Narayanasamy would however point out that the work order was for the period 1.11.13 to 31.10.14 and there was nothing on record to indicate that the assesse has entered into an identical work order for the present period as well viz. Financial year 2009-2010. We also note that orders of re-assessment in respect of AY 2008-09 and 2009-10 have been passed accepting the assessee's claim for depreciation at the rate of 30%. However, the orders are cryptic and contain no reasoning on the basis of which the claim stands accepted.

5. In so far as this is an exercise of fact finding, not embarked upon by any authority thus far, we remand the issue to the file of the assessing officer for decision afresh after due opportunity to the assessee and consideration of all relevant materials.

6. Depreciation claimed in respect of Truck No.4 at the rate of 30% has been disallowed by the assessing authority on the ground that the truck stands in the name of a third party. The contention of the assessee was to the effect that since possession of the asset was with him and there was no dispute that it is actually utilized in business he was entitled to the grant of depreciation. Reliance was placed on the judgment of the Supreme Court in Mysore Minerals Ltd. vs Commissioner of Income Tax (239 ITR 775). The Supreme Court, in the aforesaid judgment holds that as per section 32 of the Income Tax Act, a person in possession of the property, exercising domain over the property and having the right to use and occupy the property in his own right would, for all intents and purposes, be treated as an 'owner' for the purposes of grant of depreciation.

7. In the present case, as we have noted earlier, there is no clarity with respect to the facts in issue. In fact, the finding of the assessing officer was to the effect that nothing has been produced to show that the assessee has the right to use and exploit the asset in his business. The learned counsel seeks to persuade us to allow the claim on the ground that the income generated by the utilization of truck 4 has infact, been brought to tax. We are however of the view that the allowability of depreciation is a separate issue in law that has to be considered de-hors this aspect.

8. Substantial Questions of Law 2 stands remanded to the file of the assessing officer for examination after affording

due opportunity to the assessee. The entire exercise may be completed within a period of three months from the date of receipt of a copy of this order.

9. Learned Counsel for the petitioner does not press substantial Question No.3 and the same is hence dismissed.

Sd/-
Asst.Registrar (CO)

/true copy/

Sub Asst. Registrar

msr

TO:

1 The Income Tax Officer,
Business Ward - V(1)
Chennai

2 The Commissioner of Income Tax
(Appeals V), Nungambakkam,
Chennai-600 034

3 The Income Tax Appellate Tribunal,
Rajaji Bhavan, IIIrd Floor,
Besant Nagar,Chennai-600 090

+ 1 cc to M/s.S.Sridhar, Advocate,SR.4694

+ 1 cc to Mr. J. Narayanasamy Advocate,SR.4863

T.C.A.NO.673 OF 2016

VGII(CO)

NR 05/10/2017