IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated : 19.07.2018

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THE HONOURABLE MR. JUSTICE M.M.SUNDRESH
and
THE HONOURABLE MR. JUSTICE N.ANAND VENKATESH

T.C.(A). No.1003 of 2010

The Commissioner of Income Tax II,
Coimbatore. .. Appellant/ Respondent

vs.

Shri Lithiya Sekar,
Proprietor M/s.N.G.K. Leather,
51, Deviapuram, R.N.Pudur,
Erode - 638 003. .. Respondent/ Appellant

Appeal filed under Section 260A of the Income Tax Act, 1961 against the order of the Income Tax Appellate Tribunal "D" Bench, Chennai dated 20.11.2009 passed in I.T.A. No.832/Mds/2009, against the order dated 16/03/2009 passed by the commissioner of Income Tax (Appeals)-1, Coimbatore, against the assessment year 2005-2006 against the assessment order dated 19/12/2008 for the assessment year 2005-2006 by the assistant Commissioner of Income Tax, Circle-1 Erode, against the P.A No./G/R.No.AAZPL9831B.

For Appellant : Ms.K.G.Usharani
for Mr.T.R.Senthil Kumar

For Respondent : Ms.Gurumeet Kour
for M/s.R & P Partners

JUDGMENT

(Judgment of the Court was delivered by M.M.SUNDRESH, J.)

The Revenue has filed this appeal by formulating the following substantial questions of law in respect of the assessment year 2005-2006:

"(1)Whether on the facts and in the circumstances of the case, the Income Tax Appellate Tribunal was right in law in holding that the assessee have satisfied the requirement of second proviso to Rule 5 (1A) of the Income Tax Rules and they are entitled for depreciation on wind mills as per Appendix I is valid?

(2)Whether on the facts and in the circumstances of the case, the Income Tax Appellate Tribunal was right in law in granting 80% of depreciation on wind mills, even though the proviso to Section 32(1)(i) and Rule 5(1A) clearly stipulate that only rate of depreciation on cost method as provided for in Appendix -IA will be relevant for power generating machinery?

(3)Whether on the facts and in the circumstances of the case, the Tribunal was right in law in granting depreciation at the rate of 80% of wind mills, even though the assessee is entitled 7.69% of the cost and this rate of depreciation has been correctly allowed by the Assessing Officer?

(4)Whether on the facts and in the circumstances of the case, the Income Tax Appellate Tribunal was right in law in holding that the assessee is entitled for higher rate of depreciation even though the assessee has filed return on due date and has also not exercised his option separately?"

2.Heard the learned counsel appearing for the appellant and the learned counsel appearing for the respondent.

3.Learned counsel appearing for the appellant submits that the issue involved in this appeal viz., low tax effect has already been considered by this Court in T.C.A. No.1528 of 2007 on 06.06.2018 and the following order has been passed:

"3. It may not be necessary for us to decide the substantial question of law framed for consideration, on account of the low tax effect in this appeal. This issue was considered by us in the case of Commissioner of Income Tax vs. N.Meenakshisundaram in T.C.(A) Nos.868 & 869 of 2008 dated 23.04.2018, by taking note of the Circular Instructions issued by the Central Board of Direct Taxes (CBDT) and also taking note of the submissions of the Revenue, the relevant portions of which are quoted hereunder:

"10. An argument was advanced by the learned

Senior Standing Counsel for the Revenue that the circular can have effect only, while filing the appeal and not while hearing of the appeal and would have no impact on the appeals, which are admitted and pending. However, in the Circular issued in the year, 2015, it has been made clear that, it will apply to pending appeals as well. In respect of the earlier circulars, it would be relevant to take note of the decision of the Hon'ble Supreme Court in Mathew M. Thomas Vs Commissioner Of Income-Tax [(1999) (III) ELT 4 SC] wherein, the Hon'ble Supreme Court, while considering the effect of Circular No.445, dated 16.05.1986, pointed out that Circular No. 455 dated 16.5.1986 issued by the C.B.D.T. is applicable to all pending proceedings which have not attained finality under Section 269 I of the Act as defined in the explanation to the said Section.

....

14. Therefore, the Circular has to be understood as part of the litigation policy of the Government of India to reduce the litigation and to bring down the number of Appeals, which are pending before the Court and also ensure that the Appeals are not preferred by the Department without proper examination of the case on merits. ....

15. As per the Circular/Instruction issued by CBDT, the present Appeal should be not pressed by the Revenue. If, at the time of filing of the Appeal, decision has to be taken whether to file an Appeal or not and the Authority by due application of mind and bearing the two caveats laid down by the Hon'ble Supreme Court, in Surya Herbal Ltd., case (supra) should take a decision. In cases, where, the Appeals are pending before the Court, appropriate Officer has to take a decision. In the instant case, it appears that, no such specific instruction is issued to Mr.M.Swaminathan, the learned Senior Standing Counsel to withdraw the Appeal, nor, can we compel the learned counsel to withdraw the Appeal.

16. Having held that the Circular issued by CBDT is applicable to the case on hand and the tax effect being less than the threshold limit

prescribed in the Circular, we dismiss the present Appeal by applying the law laid down by the Hon'ble Supreme Court, in Surya Herbal Ltd., case (supra), as the two caveats mentioned thereunder does not arise in the instant case.”

4.By applying the above decision, we dismiss this tax case (appeal) on the ground of low tax effect and in terms of the above referred decision, leave the substantial question of law, which has been framed for consideration. No costs."

4.In such view of the matter and in view of the circular issued by the Central Board Direct Taxes in Circular No.21/2015 dated 10.12.2015, this tax case appeal is dismissed on the ground of low tax effect, leaving the substantial questions of law open, which have been framed for consideration. No costs.

Sd/-
Assistant Registrar(CS V)

//True Copy//

Sub Assistant Registrar

mmi

To

1.The Income Tax Appellate Tribunal,
"D" Bench, Chennai.

2.The Commissioner of Income Tax , (Appeals)-1
Coimbatore.

3.The Assistant Commissioner of Income Tax ,
Circle -1, Erode

Copy to

The Section officer,
VR. Section,
High Court, Madras.

+1cc to Mr.T.R.Senthil kumar, Advocate, S.R.No.48250
+1cc to Mr.R&P.Partners, Advocate, S.R.No.48672

T.C.(A).No.1003 of 2010

GJII(CO)
GSP(09/08/2018)