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.1004 of 2010

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

vs.

M/s.K.K.S.Khader Mohideen Sahib
and Sons,
15, E.M. Balasubramaniam Road,
Thiru Nagar, 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.834/Mds/2009 and against appeal no.248/2008-09 dated 19.3.2009 by the Commissioner of Income Tax/Appeal -I/Coimbatore and against the P.A No.AAEFK6858Q/ward - I(1), Erode/2002-03 dt.31.12.2008 by the Income Tax Officer, ward I(1), Erode.

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

For Respondent : Mr.Subbaraya Aiyar

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 2002-2003:

"(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.The assessee filed income tax return by claiming depreciation at the rate of 80% on wind mills. The assessing officer restricted the claim to 7.69% on the ground that the assessee had not exercised the option under proviso to Rule 5 (1A) of Income Tax Rules for claiming depreciation at a higher rate. The appeal filed by the assessee before the Commissioner of Income Tax (Appeals) was dismissed, confirming the order of the assessing officer. Against which, the assessee preferred an appeal before the Income Tax Appellate Tribunal. The Tribunal relied upon the judgments of the Punjab and Haryana High Court in CIT Vs. Jindal Steels and Power Limited (180 Taxman 543) and Bombay High Court in CIT Vs. Vijaya Hirasa Kalamkar (229 ITR 772) and allowed the appeal. Aggrieved by the same, the Revenue is before us with this appeal.

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

4.When the matter is taken up for hearing, learned counsel appearing for the respondent/assessee submits that the issue involved in this appeal is covered by the order of this Court in Commissioner of Income Tax, Coimbatore Vs. Kikani Exports (P) Ltd., ((2015) 369 ITR 500) against the Revenue and in favour of the assessee. In the said decision, it has been held that the third proviso clearly states that the option once exercised will continue to all the subsequent years and therefore, the assessee is not required to exercise such option each and every year separately.

5.In such view of the matter, the Tax Case Appeal stands dismissed. No costs.

Sd/-
Assistant Registrar(CS VIII)

//True Copy//

Sub Assistant Registrar

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To

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

2. The Commissioner of Income Tax II,
   Coimbatore

3. The Commissioner of Income Tax
   Appeal I,
   Coimbatore

4. Income Tax Officer Ward I(1),
   Erode

+1cc to Mr.T.R.Senthilkumar, Advocate Sr.No.48248
+1cc to Mr.Subbaraya Aiyar, Advocate Sr.No.48769

VBA(CO)
sm:7.8.2018