IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD
980 INCOME TAX APPEAL NO.6 OF 2018

THE PR. COMMISSIONER OF INCOME TAX -1 AURANGABAD
..APPELLANT

VERSUS

M/S GOODYEAR SOUTH ASIA TYRES PVT. LTD., WALUJ AURANGABAD ..RESPONDENT

…

Mr. Alok M. Sharma, Advocate for the Petitioner.
Mr. Girish K. Thigale (Naik), Advocate for Respondent.

…

CORAM : S. V. GANGAPURWALA &
MANGESH S. PATIL, JJ.
DATED : 21st JUNE, 2019.

PER COURT:-

1. The matter pertains to Assessment Year 2008-2009.

2. Mr. Sharma, learned counsel for the appellant submits that the appeal is filed on following substantial question of law:

1. Whether on the facts and in the circumstances of the case and in law the learned Tribunal was justified in holding that the depreciation allowances worked-out even after eight subsequent assessment years is allowable, ignoring the amendment to Section 32(2) by the Finance Act, 2001?

2. Whether on the facts and in the circumstances of the case and in law the learned Tribunal, by relying on the decision of a Hon'ble High Court not within its jurisdiction, was justified in holding that the depreciation

allowances worked-out even after eight subsequent assessment years are allowable, as such a decision is not binding upon it?

3. Whether on the facts and in the circumstances of the case and in law the learned Tribunal was justified in not considering the finding of the ITAT, Mumbai Bench in its decision in the case of DCIT, Circle-1(3), Mumbai v. Times Guaranty in ITA Nos.4917 and 4918/Mum/2008 for the Ays 2003-2004 & 2004-2005 dated 30/06/2010, in which it has been held that unabsorbed depreciation of earlier period is allowable under the new provision, but is to be dealt with in accordance of the old provision?

3. The learned counsel submits that the amendment to section 32(2) of the Finance Act, 2001 would be prospective in nature. It cannot have retrospective operation. The period of which the petitioner is seeking benefit is 1997-1998, 1998-1999 and 1999-2000. The learned counsel to substantiate his contention relies on the judgment of the Madras High Court in a case of **The Commissioner of Income Tax Vs. M/s. Jain Housing and Constructions Ltd.** reported in **(2012) 6 TaxCorp (DT) 53338 (Madras).** According to the learned counsel the presumption is that the amendment is always prospective and unless the amendment specifically stipulates, the same cannot operate retrospectively.

4. Mr. Thigale, learned counsel submits that in respect of the same parties for the Assessment Year 2007-2008, this Court has dismissed the Appeal

filed by the Revenue involving the same issue under order dated 26.02.2018 in Income Tax Appeal No.06/2016. The said order has not been assailed by the Revenue before the Apex Court. Even on the ground of parity, the same has to be followed. The learned counsel further relies on the judgment of the jurisdictional High Court in **Commissioner of Income Tax-1, Mumbai Vs. Hindustan Unilever Ltd.** reported in **(2016) 72 taxmann.com 325 (Bombay)**, so also the judgment of Gujarat High Court in case of **General Motors India (P.) Ltd. Vs. Deputy Commissioner of Income Tax** reported in **(2012) 25 taxmann.com 364 (Guj.)**. The learned also relies on the judgment of the Gujarat High Court in case of **Principal Commissioner of Income Tax Vs. Accura Polytech (P.) Ltd.** reported in **(2018) 89 taxmann.com 183 (Gujarat)**. According to the learned counsel the said judgment has been confirmed by the Apex Court in SLP No.29228/2018 under order dated 10.09.2018.

5. We have considered the submissions canvassed by the learned counsel for the respective parties.

6. It is a matter of record that for the Assessment Year 2007-2008, the similar issue between the litigating parties had arisen and this Court under order dated 26.02.2018 dismissed the Income Tax Appeal No.06/2018 filed by the Revenue.

In the said appeal also the similar substantial questions of law were raised. The amendment of Section 32(2) of Finance Act, 2001 was under consideration. It was held that the Assessee would be entitled to have benefit of unabsorbed depreciation.

7. In case of **Principal Commissioner of Income Tax Vs. Accura Polytech (P.) Ltd.** (supra) the very issue was before the Gujarat High Court. In the said case it was held that the amendment in Section 32(2) of the Act is applicable from Assessment Year 2002-2003 and subsequent years. It further observed that any unabsorbed depreciation available to an Assessee on 01.04.2002 will be dealt with in accordance with provision of Section 32(2) of the Act, as amended by the Finance Act, 2001 and not by the provisions of Section 32(2) of the Act, as it stood before the said amendment.

8. The jurisdictional High Court in case of **Commissioner of Income Tax-1, Mumbai Vs. Hindustan Unilever Ltd.** (supra) observed thus:

“3. Regarding question no.1(a), 1(b) and 1(c):

(a) Mr. Pinto, learned counsel for the revenue states that all the three questions deal with the issue of justifiability of application of Arms Length Price (ALP) only to A.E. transactions and not to all transactions. Mr. Pinto further very fairly states that the issue raised herein with regard to transfer pricing adjustments stand concluded against the revenue and in favour of the respondent – assessee by decisions of this Court in (CIT Vs. M/s. Tara Jewellers Exports Pvt. Ltd. in Income Tax Appeal No.1814 of 2013 rendered on 5th October, 2015, CIT V. Pedro Araldite Pvt. Ltd. Income Tax Appeal No.1804 of 2013 rendered on 24th November, 2015., CIT V. M/s. Thyssen Krupp Industries Pvt. Ltd. Income Tax Appeal No.2201 of 2013 rendered on 2nd December, 2015; CIT V. M/s. Summit Diamond (India) Pvt. Ltd. Income Tax Appeal No.1647 of 2013 rendered on 11th July, 2016).

(b) In the above view question, nos.1(a), 1(b) and 1(c) being concluded by order of this Court, no substantial questions of law arises. Thus not entertained."

9. In view of the consistent views taken by this Court and the Gujarat High Court and confirmed by the Apex Court and also considering the fact that for the previous Assessment Years the same issue has been held against Revenue, no substantial question of law arises.

10. The present appeal is dismissed. No costs.

(MANGESH S. PATIL)
JUDGE

(S. V. GANGAPURWALA)
JUDGE

Devendra/June-19