dik

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
O.O.C.J.

INCOME TAX APPEAL NO. 1609 OF 2016

Pr. CIT-2 Kolhapur ...Appellant
vs
M/s RDS Construction Co. ...Respondent.

.....

Mr N.N.Singh for the Appellant.

.....

CORAM : AKIL KURESHI &
B.P.COLABAWALLA, JJ.
FEBRUARY 13, 2019.

P.C. :

This appeal is filed by the Revenue challenging the Judgment of the Income Tax Appellate Tribunal. The following questions are presented for our consideration

"(a) Whether on the facts and in the circumstances of the case and in law, the Tribunal was justified in holding that AO has not power to reassess the income u/s 153A even in the case of completed assessment u/s 143(3) of the I.T.Act, 1961?

(b) Whether on the facts and in the circumstances of the case and in law, the ITAT was right in deleting the additions made by the AO u/s 41(1) on a/c of bogus claim of expenses in the name of labour contractors/ sub-contractors which are outstanding for a number of years ?

(c) Whether on the facts and in the circumstances of the case and in law, the Hon'ble ITAT erred in allowing depreciation @ 80 % on civil construction, electrical and other non-integral installations?

(d) Whether on the facts and in the circumstances of the case and in law, the Hon'ble ITAT erred in allowing depreciation @ 80 % on civil work on which depreciation was allowable @ 10 % and since civil works are not specially designed devices, the same are not entitle for higher rate of depreciation?

(e) Whether on the facts and in the circumstances of the case and in law, the Hon'ble ITAT erred in allowing higher rate of depreciation on electrical and other installations without appreciating the fact that electrical items are not part of electricity generating appartus but are part of electricity selling apparatus and these constitute the block 'Plant and Machinery' on which depreciation is allowable @ 15 %?

(f) Whether on the facts and in the circumstances of the case and in law, the Tribunal was justified in treating the compensation received from Suzlon Energy Ltd. On a/c of revenue loss as capital receipts?

2 Question Nos.(a) and (b) came up for consideration in Income Tax Appeal No.1753 of 2016 concerning the very same respondent assessee. The Revenue's appeal was dismissed making the following observations.

> **2** This appeal is filed by the revenue challenging the Judgment of the Income Tax Appellate Tribunal. The following questions are presented for our consideration.
>
> "(A) Whether on the facts and in the circumstances of the case and in law, the Tribunal was justified in holding that AO has not power to reassess the income u/s 153A even in the case of completed assessment u/s 143(3) of the I.T.Act, 1961 ?
>
> (B) Whether on the facts and in the circumstances of the case and in law, the ITAT was right in deleting the additions made by the AO u/s 41(1) on a/c of bogus claim of expenses in the name of labour contractors / sub-contractors which are outstanding for a number of years?"
>
> **3** Question No.1 is fairly covered by the Judgment of Division Bench of this Court in the case of **Commissioner of Income Tax Vs. Continental Warehousing Corporation Ltd.** reported in **372 ITR 645**. It was held that in the proceedings under Section 153(3) of the Income Tax Act, 1961 ("IT Act" for short), finalized assessment or the reassessment shall not abate, and only undisclosed income and undisclosed assets detected during the search could not be brought to tax. In that view of the matter no question of law arise in this respect.
>
> **4** Question No.2 came up for consideration on similar situation. The question was rejected by making the following observations -

> "6. Insofar as question no.(i) is concerned, the same arises out of the additions made by the Assessing Officer under Section 41(1) of the Income Tax Act, 1961 ("the Act" for short) on account of bogus claim of liability. The Tribunal while giving relief to the assessee, referred to the decision of the Supreme Court and other decisions holding that merely because period of 3 years expired from arising of the liability would not automatically mean that the liability has ceased. We do not find any error in the view of the Tribunal."

3 Question Nos.(c)(d) and (e) came up for consideration in Income Tax Appeal No.60 of 2017 concerning the same assessee for the A.Y. 2008-09. By a separate order passed today, the Revenue's appeal is dismissed making the following observations

> This appeal is filed by the Revenue challenging the Judgment of the Income Tax Appellate Tribunal. The following questions are presented for our consideration
>
> "(A) Whether on the facts and in the circumstances of the case and in law, the Hon'ble ITAT erred in allowing depreciation @ 80 % on civil construction, electrical and other non-integral installations?
>
> (B) Whether on the facts and in the circumstances of the case and in law, the Hon'ble ITAT erred in allowing depreciation @ 80 % on civil work on which depreciation was allowable @ 10 % and since civil works are not specially designed devices, the same are not entitle for higher rate of depreciation?
>
> (C) Whether on the facts and in the circumstances of the case and in law, the Hon'ble ITAT erred in allowing higher rate of depreciation on electrical and other installations without appreciating the fact that electrical items are not part of electricity generating apparatus but are part of electricity selling apparatus and these constitute the block "Plant and Machinery" on which depreciation is allowable @ 15 %?"

2 Learned counsel for the Revenue brought to our notice an order dated 30st January, 2019 in Income Tax Appeal No.1769 of 2016 in which all these question as produced above, came up for consideration. While disposing of the Revenue's appeals, following observations were made

> "7. Question Nos. (ii), (iii) and (iv) relate to the Revenue's objection to the assessee claiming higher rate of depreciation on the civil construction, electric and other installations by the assessee in the process of erecting and installing windmill. The Revenue argues that the expenditure in such activities cannot be

seen as a part of installation of windmill and, therefore, the depreciation prescribed for the same would not be available to the assessee. We notice that the similar question had come up for consideration before this Court in Income Tax Appeal No. 1326 of 2010, wherein the appeal was dismissed by order dated 14th June, 2017 making following observations:-

> "2. *The Tribunal has recorded finding of fact that windmill was erected in the desert area of Rajasthan which required special foundation of reinforced cement concrete and that the said reinforced cement concrete formed integral part of the windmill. The Tribunal has also followed the decision of this Court in the case of Commissioner of Income Tax Vs. Herdilla Chemicals Ltd. recorded in (1995) 216 I.T.R. 742 (Bom) in allowing the claim of the assessee. In our opinion, the finding recorded by the Tribunal that RCC foundation forms integral part of the windmill is a finding of fact and no question of law arises from the same. Hence, the appeal is dismissed with no order as to costs"*

8. In the result, these additional questions are not entertained."

4 The next question argued before us was question (f) and it arise in the following manner-

The respondent - assessee had received sum of Rs.40 Lacs by way of compensation from one M/s Suzlon Energy Ltd. on account of delay caused in completion of wind power project to be installed at Dhalgaon (Maharashtra) for the assessee. The A.O. was of the opinion that the receipt was revenue in nature, and therefore, taxable in the hands of the assessee. The Tribunal while reversing the decision of the A.O. in CIT(A), in the impugned Judgment held that the receipt was capital in nature. The reliance was placed on the decision of the Supreme Court in the case of the **Commissioner of Income Tax** Vs. **Saurashtra Cement Ltd.** reported in **(2010) 325 ITR 422(SC)**. It was the case in which the assessee had received liquidated damages on account of delay in supplying the additional cement plant. The agreement contained a condition that in the event of delay in delivery of machinery the assessee would be compensated at the agreed rate. The question arose whether such a payment by way of liquidated damages would in the nature of capital receipt or revenue receipt. The Supreme Court held that the receipt in question was capital in nature.

6 In the present case also similar situation has arisen. The assessee had placed order for installation of a plant. The supplier M/s Suzlon Energy Ltd. could not fulfill the commitments within the time frame envisaged in the agreement. Such agreement provided for compensation in case of delay. The payment was in terms of such an agreement. Effectively, this payback from the supplier would reduce the assessee's cost of acquisition of the plant and machinery. The receipt was clearly capital in nature. No question of law arises. In the result Income Tax Appeal is dismissed. No order as to costs.

(B.P.COLABAWALLA, J.) **(AKIL KURESHI, J.)**