IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

INCOME TAX APPEAL NO.124 OF 2017

Pr.Commissioner of Income Tax-23 … Appellant

V/s.

M/s Firoz Tin Factory … Respondent

Mr.Sham Walve for the Appellant.
Mr.Girish Dave i/by Mr.Tanzil Padvekar for the Respondent.

CORAM : AKIL KURESHI AND
SARANG V. KOTWAL, JJ.
DATE : MARCH 12, 2019.

P.C.:-

1. Revenue has filed this appeal against the judgment of the Income Tax Appellate Tribunal raising following questions for our consideration:

> "I. Whether on the facts and in the circumstances of the case and in law, the ITAT is justified in holding that there did not exist any building on the sold property especially in view of the fact the specification in agreement of sale and incriminating material found in survey confirmed existence of super structure on sold property?
>
> II. Whether on the facts and in the circumstances of the case and in law, the ITAT was justified in not

> appreciating that property sold consisting of building and land appurtenant to the building needed to be taxed as per the provisions of Section 50 as single property?"

2. During the period relevant to the assessment year 2010-11 the assessee had sold a piece of land and offered the consideration to long term capital gain. During the survey operation however the Assessing Officer recorded the statement of the representative of the assessee-company indicating that there was a factory building situated on the land. The revenue therefore, contends that such building would be subject to depreciation and for the purpose of charging capital gain the depreciated value of the super structure should be taken into consideration. Learned counsel for the assessee however pointed out that such statement was promptly retracted.

3. The Tribunal by the impugned judgment held that there was no super structure on the land, which could be subjected to depreciation. The Tribunal noted that the property remained as land and minimum structure of as shed and compound wall was constructed when the property was given on rent to L & T for

parking their vehicles. The Tribunal held and observed as under:-

> "20. We are unable to agree with the view expressed by Ld. CIT (A) on this issue. It is the Ld. CIT (A), who has given a definite finding that the Kalina property did not have any factory structure. The total value of Kalina Property (cost of land + amount spent thereon) Rs.29.15 lakhs remained the same since 1995 onwards. There is no controversy on this fact. The assessee has given explanation that the amount of about Rs.26.00 lakhs was spent on land levelling, construction of compound wall and a watchman shed. This explanation of the assessee has not been proved to be false. The fact that the assessee has carried on its manufacturing activities in Kalachowki building was also accepted. Hence, the Ld CIT (A) has held that the assessee did not carry on any manufacturing activity in Kalina Property. Having held so, we are not able to understand as to how the Ld. CIT (A) could hold that the Kalina property could have been subjected to depreciation. The facts noted down by the Ld. CIT(A), in our view, shows that the Kalina property remained to be a land with a minimum structure of a shed and compound wall. This is further fortified by the fact that the assessee has let out the land for container parking and thereafter to Larsen & Toubro. It is an accepted fact that the rent paid by Larsen & Toubro was subjected to tax deduction at source u/s 194I of the Act, i.e., as rent only. Thus, we notice that the assessee has received rent for letting out the land only.
>
> 21. We notice that the Ld. CIT (A) has decided this issue against the assessee mainly for the reason that the assessee could not produce assessment records pertaining to period prior to AY 1996-97. It is pertinent to note that both the assessee and the revenue did not have assessment record prior to that period. The assessee was asked to produce the

assessment records for the periods from AY 1975-76 onwards during the course of assessment proceedings undertaken in the year 2012. It may be noticed that considerable time has elapsed by that time and it would be difficult for anyone to produce old records, that too, more than 20 years old. This is fortified by the fact that the revenue also did not possess the old records. Under these set of facts, we are of the view that the tax authorities are not justified in taking adverse view of the matter. When the Ld. CIT (A) has come to a define conclusion that the Kalina property was not used for factory purposes, we are of the view that there is no reasons to hold that the assessee could have claimed depreciation on the Kalina property, simply for the reason that the assessee did not produce assessment records. Accordingly, we are of the view that the Ld. CIT (A) was not justified in holding that the assessee could have claimed depreciation on the Kalina property, as the said view is based on surmises and conjectures."

4. Perusal of the documents on record and in particular the impugned judgment of the Tribunal would show that the entire issue is factual. The Tribunal having considered the relevant materials on record has come to conclusion which has not shown to be perverse. No question of law arises. Income Tax Appeal is dismissed.

(SARANG V.KOTWAL,J.) **(AKIL KURESHI,J.)**