

IN THE HIGH COURT OF JUDICATURE AT MADRAS**DATED 06.06.2019****CORAM****THE HON'BLE Mr.JUSTICE T.S.SIVAGNANAM****AND****THE HON'BLE Mrs.JUSTICE V.BHAVANI SUBBAROYAN****Tax Case Appeal Nos.1411 and 1412 of 2008**
and 466 of 2007

M/s.EID Parry (India) Limited,
'Dare House',
No.234, NSC Bose Road,
Chennai - 600 001.

...

Appellant
in all TCAs

Vs.

The Asst. Commissioner of Income Tax,
Company Circle - II (1),
Chennai - 600 034.

...

Respondent
in TCA No.1411 of 2008

The Joint Commissioner of Income Tax,
Special Range - I,
Chennai - 600 034.

...

Respondent
in TCA No.1412 of 2008
& TCA No.466 of 2007

Appeals preferred under Section 260A of the Income Tax Act, 1961 against the orders of the Income Tax Appellate Tribunal, Chennai 'A' Bench dated 29.06.2007 and 29.07.2005 in I.T.A.No.3305/Mds/2004 & I.T.A.No.1865/Mds/2002 for the Assessment Years 1997-98 & 1998-99, I.T.A.No.1853/Mds/2002 & I.T.A.No.1885/Mds/2005 for the Assessment Years 1998-99 & 2003-04 and I.T.A.Nos.357, 358, 397 & 400/Mds/2000 for the Assessment Years 1996-97 & 1998-99 respectively.

For Appellant : Mr.M.P.Senthil Kumar
in all TCA

For Respondents : Mr.T.Ravikumar
in all TCA Sr. Standing Counsel

COMMON JUDGMENT

(Judgment of the Court was delivered by T.SIVAGNANAM,J.)

All these Appeals have been filed by the appellant assessee under Section 260A of the Income Tax Act, 1961 (the Act for brevity), challenging the orders passed by the Income Tax Appellate Tribunal, Chennai 'A' Bench dated 29.06.2007 and 29.07.2005 in I.T.A.No.3305/Mds/2004 & I.T.A.No.1865/Mds/2002 for the Assessment Years 1997-98 & 1998-99, I.T.A.No.1853/Mds/2002 & I.T.A.No.1885/Mds/2005 for the Assessment Years 1998-99 & 2003-04 and I.T.A.Nos.357, 358, 397 & 400/Mds/2000 for the Assessment Years 1996-97 & 1998-99 respectively.

2. Since the issues involved in all these Appeals are common and the appellant assessee is one and the same person, we have heard all these Appeals together.

3. For the sake of convenience, we have listed out the issues arising in each of the Appeals in a Tabulated Format as hereunder;

#	Issues	TCA No.	1411/08	1412/08	466/07
		ITA No.	3305/2004	1865/2002	358/00
		A.Y.	1997-98	1998-99	1998-99
1	Jurisdiction u/s.147 - change of opinion	✓ Que.1			
2	Provision for Purchase Tax - whether ascertained liability and not to be added while computing book profits u/s.115JA	✓ Que.2		✓ Que.3	
3	Provision for Purchase Tax on cane subsidy - whether ascertained liability and not to be added while computing book profits u/s.115JA	✓ Que.3			
4	Provision for Wealth Tax - whether ascertained liability and not to be added while computing book profits u/s.115JA	✓ Que.4		✓ Que.4	
5	Provision for Bad debts - whether ascertained liability and not to be added while computing book profits u/w.115JA	✓ Que.5		✓ Que.5	
6	Disallowance of Depreciation on unabsorbed depreciation of Amalgamating Company M/s.Falcon Gulf Ceramics Limited			✓ Que.1	
7	Euro issue Expenses u/s.35D			✓ Que.2	
8	Disallowance of provisions for payment of purchase tax and wealth tax in computing the book profits u/s.115JA while processing return u/s.143(1)(a) Whether AO had materials to determine provisions for payment of purchase tax and wealth tax were unascertained?				✓ Ques.1 & 2

4. In the above Tabulated Statement, the issues arising in each of the Appeals have been indicated with a tick mark and also the number given to the substantial questions of law framed for consideration.

5. We have heard Mr.M.P.Senthil Kumar, learned Counsel for the appellant assessee and Mr.T.Ravikumar, learned Senior Standing Counsel for the respondents Revenue.

6. We proceed to decide the various issues in seriatim as indicated in the above Tabulated Statement. The first question of law is whether the reopening of the assessment for the Assessment Year 1997-98 was justified and whether the Tribunal was right in law upholding the jurisdiction by observing that no opinion was formed, even though no fresh material was available with the Assessing Officer for re-opening the assessment?. This issue is no longer *res integra* and has been decided against the assessee in the decision of the Gujarat High Court in the case of **Roto Screentech Pvt. Ltd. vs. Asst. Commissioner of Income Tax** reported in **291 ITR SC 500**.

7. As rightly pointed out by Mr.T.Ravikumar, learned Senior Standing Counsel for the Revenue, in the recent decision of the Hon'ble Supreme Court in the case of **Deputy Commissioner of Income Tax and others vs. Zuari Estate Development and Investment Company Ltd.** reported in **2015 CJ (SC) 1136**, it was held that there being no assessment under Section 143(1)(a) of the Act, the question of change of opinion does not arise. Applying

the above mentioned decisions, substantial question of law No.1 is decided against the assessee.

8. We now proceed to decide three issues jointly, since the common point to be decided is whether the provision made by the assessee for purchase tax, purchase tax on cane subsidy and wealth tax are not to be added while computing the book profits under Section 115JA of the Act.

9. Mr.M.P.Senthil Kumar, learned counsel for the assessee would contend that the purchase tax was payable on sugarcane purchased from the cane growers and as on the date of making provision for the purchase tax, the assessee is aware of the quantity of the sugarcane purchased and the liability of the purchase tax there on. This provision and the payment of purchase tax were made every year. Therefore, it is an ascertained liability.

10. So far as the cane subsidy is concerned, it is contended that the same is provided to sugarcane growers for bringing the cane from their field where the distance is more than 10Kms to reach the Sugar Mill and this subsidy forms part of sale price and purchase tax is payable thereon and therefore, it is an ascertained liability.

11. So far as the wealth tax is concerned, it is contended that it will not fall under Clause (1) of the Explanation to Section 115J of the Act, since the Income Tax is only mentioned therein. In support of such contention, the learned Counsel placed reliance on the decision of the High Court of Bombay in the case of ***Commissioner of Income Tax vs. Echjay Forgings (P) Ltd.*** reported in ***(2001) 251 ITR 15 (Bom)***.

12. Mr.T.Ravikumar, learned Senior Standing Counsel appearing for the Revenue contended that the purchase tax or the purchase tax on cane subsidy or the wealth tax was not paid by the assessee but only a provision was made. It is submitted that in all the Appeals, the First Appellate Authority as well as the Tribunal have concurrently held that no scientific method has been adopted by the assessee for making the provision. Further, by referring to the relevant provisions of The Sugarcane [Control] Order, 1966, more particularly, order No.5-A (1), (3), (4), (7) and (9) submitted that the liability arises only after Notification was issued by the Central Government and therefore, no provision can be made. Further, by referring to the Assessment Order, it is submitted that there is a gross discrepancy in the provision made as substantial amount of money, which was provided for in the previous year were returned back in the subsequent year, which clearly shows that no scientific method has been adopted.

13. So far as the wealth tax is concerned, it is submitted by Mr.T.Ravikumar, learned Senior Standing Counsel that the wealth tax liability accrues as on 31st March of every year and nothing prevented the assessee from effecting payment under adhoc method and the Assessing Officer, the Commissioner of Income Tax and the Tribunal were perfectly right in rejecting the plea raised by the assessee.

14. To decide this question, we shall first take note of the meaning of the word "provision". First, we should steer clear of what is a provision in terms of the Income Tax Act, 1961. In the case of ***Shree Sajjan Mills Ltd., vs. Commissioner of Income Tax*** reported in ***(1985) 4 SCC 590***, it is pointed out that the expression provision under Section 40A(7) has not been defined in the Act and is not used in any artificial sense but in its ordinary sense. It was held that the provision in its ordinary sense means something that is provided for future use. Thus, the assessee has made provisions with regard to the payment of the purchase tax, payment of purchase tax on cane subsidy and the wealth tax. The Assessing Officer after perusing the books of accounts of the assessee for all the relevant Assessment Years has recorded a finding that a provision is an appropriation of money for a loan and existing liability and it is necessary that

the provision in the accounts must be in accordance with the actuarial valuation of the ascertaining liability. In the assessee's case, they have made provision for purchase tax, not adopting any scientific method, but in anticipation of the Government Notification, which may not be issued after two years. With these observations, the objections raised by the assessee was overturned.

15. The Commissioner of Income Tax also re-examined the matter and found that scientific method was not adopted by the assessee to the effect that the provision with regard to the purchase tax or with regard to the wealth tax liability. Thus, applying the decision, it is axiomatic for the assessee to adopt scientific method or follow a scientific data to justify a provision.

16. As pointed out by Mr.T.Ravikumar, the Notification for payment of additional cane price etc., would not arise in the Assessment Years under consideration and only in the next year. In the absence of any data to show that scientific method was adopted, we are of the considered view that the provisions made by the assessee towards purchase tax, purchase tax on cane subsidy and wealth tax are to be treated as unascertained liability. Therefore, the factual finding recorded by two authorities and the Tribunal is fully justified.

17. So far as the wealth tax is concerned, the decision relied on by the assessee in the case of **Shree Sajjan Mills Ltd** supra was rightly distinguished by the authorities below and the Tribunal has held in the said case that the amount on wealth tax, which was paid should not be added to the net profit. However, in the case of assessee before us, he has made only a provision for the wealth tax liability and that too was an adhoc amount, which stands crystallised as on 31st March of the relevant year. Therefore, we fully agree with the view taken by the Tribunal in the affirming orders passed by the Assessing Officer and the Commissioner of Income Tax. Accordingly, the substantial questions of law nos.2, 3 and 4 are answered against the assessee.

18. So far as the substantial question of law no.5 is concerned, with regard to the provision of liability, this arises in two of the Assessment Years, namely, 1997-98 [T.C.A.No. 1411 of 2008] and 1998-99 [T.C.A.No.1412 of 2008]. This issue came up for consideration in the assessee's own case in T.C.A.No.2511 of 2006 dated 30.10.2012 [**M/s.EID Parry (India) Limited vs. The Asst. Commissioner of Income Tax**] wherein, the Division Bench of this Court took into consideration the decision of the Delhi High Court in the case of **Commissioner of Income Tax vs. Ilpea Paramount P. Ltd.** reported in **336 ITR 54** and pointed out that by virtue of the Finance (No.2) Act, 2009, Clause (g) has been inserted in the Explanation under Section 115JA(2) of the Act with

retrospective effect from 01.04.1998 and the provisions for doubtful debts and provision for doubtful advances, which are nothing but provision for diminution in the value of the asset, are specifically covered under Clause (g) of the said Explanation and the provision for gratuity could not be added to the book profits while computing the income of a Company under Section 115JA of the Act. Accordingly, it has held that the amendment thus goes directly against the assessee.

19. Applying the said decision, the assessee will be entitled for the relief for the Assessment Year 1997-98, which is the subject matter of T.C.A.No.1411 of 2008 and not entitled for the relief for the Assessment Year 1998-99, which is the subject matter of T.C.A.No.1412 of 2008.

20. In the light of the above, substantial question of law No.4 is answered in favour of the assessee in T.C.A.No.1411 of 2008 and answered against the assessee in T.C.A.No.1412 of 2008.

21. With regard to the issues 6 & 7, which are substantial questions of law Nos.1 & 2 in T.C.A.No.1412 of 2008 relating to the unabsorbed depreciation and expenditure in connection with Euro issue allowable as deduction under Section 35D of the Act, it is not in dispute before us that the

said question has been decided by the Division Bench of this Court in the assessee's own case for the Assessment Years 1994-95 and 1995-96, in the decision reported in **(2012) 82 CCH 145 [EID Parry (India) Limited vs. Deputy Commissioner of Income Tax]**.

22. Thus, in the light of the above decision, substantial questions of law Nos.1 and 2 in T.C.A.No.1412 of 2008 are decided in favour of the assessee. This leaves us with the last issue, which pertains to disallowance of provisions for payment of purchase tax and wealth tax in computing the book profits under Section 115JA of the Act while processing return under Section 143(1)(a) of the Act and whether the Assessing Officer had materials to determine provisions for payment of purchase tax and wealth tax were unascertained. These issues are framed as substantial questions of law Nos.1 & 2 in T.C.A.No.466 of 2007 in the Assessment Year 1998-99 in a separate Appeal in T.C.A.No.1412 of 2008 is also for the Assessment Year 1998-99 but arising out of a regular assessment under Section 143(3) of the Act.

23. Mr.M.P.Senthil Kumar, learned counsel for the assessee would contend that the Assessing Officer ought not to have disallowed the provisions at the time of processing return under Section 143(1)(a) of the Act, since the question whether there is a liability, is a debatable issue and therefore, the

Assessing Officer had no jurisdiction in making *prima facie* disallowance and to levy penalty by way of additional Tax.

24. Thus, we have to decide whether there is a debatable issue on the said point at the relevant time when the intimation was issued under Section 143(1)(a) of the Act. As rightly pointed out by Mr.T.Ravikumar, learned Senior Standing Counsel for the Revenue that this cannot be considered as a debatable issue because of the law laid down by the Division Bench of this Court in the case of ***Deputy Commissioner of Income-Tax vs. Beardsell Ltd.*** reported in ***[2000] 244 ITR 0256***. In the said decision, it was held that if a debt had become irrecoverable the same could be written off and deducted from the profit of the business. A debt, the recovery of which was doubtful could not be termed to be an ascertained liability as mentioned under Section 115J of the Act and could not be excluded from the book profits.

25. Thus, in our view, the Assessing Officer was fully justified in coming to the conclusion that the issue pointed out by the assessee is not a debatable issue and there were no two opinions possible at the relevant point of time. We reiterate the decision of the jurisdictional High Court i.e., this Court, in the case of ***Deputy Commissioner of Income-Tax*** supra, wherein it has held that the provision for bad and doubtful debts was an unascertained liability. In

such circumstances, the assessee cannot take a stand that it is an ascertained liability.

26. Thus, for all the reasons, we are of the considered view, that substantial questions of law Nos.1 & 2 in T.C.A.No.466 of 2007 are to be decided against the assessee.

27. In the result, substantial question of law No.1 in T.C.A.No.1411 of 2008 is decided against the assessee. Substantial question of law No.3 in T.C.A.Nos.1411 of 2008 and 1412 of 2008 respectively, substantial question of law No.2 in T.C.A.No.1411 of 2008, substantial question of law No.4 in T.C.A.No.1412 of 2008 are decided against the assessee. Substantial question of law No.4 in T.C.A.No.1411 of 2008 (bad debts) is decided in favour of the assessee. Substantial question of law No.5 in T.C.A.No.1412 of 2008 (bad debts) for the Assessment Year 1998-99 is decided against the assessee. Substantial question of law Nos.1 & 2 in T.C.A.No.1412 of 2008 are decided in favour of the assessee, following the earlier decision in the assessee's own case reported in **(2013) 256 CTR (Mad) 104 [EID Parry (India) Limited vs. Deputy Commissioner of Income Tax]**. Substantial question of law Nos.1 & 2 in T.C.A.No.466 of 2007 are decided against the assessee.

28. These Appeals are disposed of on the above terms. No costs.

(T.S.S.,J) (V.B.S.,J)

06.06.2019

Speaking Order/Non Speaking Order
Index : Yes / No
Internet : Yes

kmm/sri

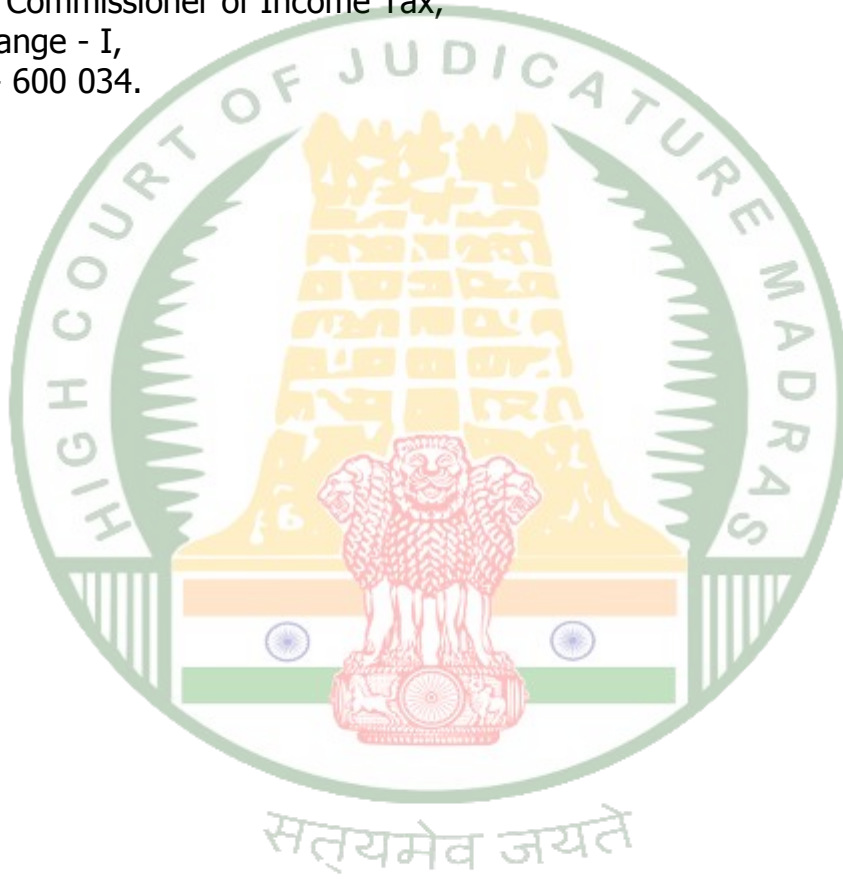


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To

The Asst. Commissioner of Income Tax,
Company Circle - II (1),
Chennai - 600 034.

The Joint Commissioner of Income Tax,
Special Range - I,
Chennai - 600 034.



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T.S.SIVAGNANAM, J.
AND
V.BHAVANI SUBBAROYAN, J.

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Tax Case Appeal Nos.1411, 1412
and 466 of 2007

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