

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 11.07.2019

CORAM

THE HONOURABLE MR.JUSTICE T.S.SIVAGNANAM
and
THE HONOURABLE MRS.JUSTICE V.BHAVANI SUBBAROYAN

Tax Case (Appeal) No.2153 of 2008

M/s.Diebold Systems Private Limited,
28/3, (Old No.54/3), Ground and 3rd Floor,
Montieth Road, Egmore,
Chennai-600 008. .. Appellant/Appellant

-vs-

The Income Tax Officer (OSD),
Company Circle I (4),
121, Nungambakkam High Road,
Chennai-600 034. .. Respondent/Respondent

Appeal under Section 260A of the Income-tax Act, 1961 against the order dated 30.04.2008 on the file of the Income Tax Appellate Tribunal, Chennai 'A' Bench, Chennai in I.T.A.No.883/Mds/2007 for the assessment year 1999-2000.

Appeal against the order dated 31/01/2007 made in ITA.No.136/2006-07/A-111 on the file of the Commissioner of Income Tax(Appeals)-III, Chennai for the assessment year 1999-2000.

Appeal against the order dated 16/03/2006 made in GINO/PAN NO AACD3206C on the file of the Income Tax Officer(OSD) Company Circle 1(4) Chennai for it assessment year 1999-2000.

For Appellant : Mr.M.P.Senthil Kumar
For Respondent : Ms.R.Hemalatha,
Senior Standing Counsel

JUDGMENT

(Delivered by T.S.Sivagnanam, J.)

This appeal filed by the appellant/assessee, under Section 260A of the Income-tax Act, 1961 (hereinafter referred to as "the Act"), is directed against the order dated 30.04.2008, passed by the Income Tax Appellate Tribunal, Chennai 'A' Bench (for brevity, "the Tribunal"), in I.T.A.No.883/Mds/2007 for the assessment year 1999-2000.

2.The above appeal is admitted on the following substantial questions of law:-

"i. Whether, on the facts and in the circumstances of the case, the Tribunal is right

in law in holding that reopening of the assessment for the Assessment Year 1999-2000 under Section 147 of the Act is valid in law?

ii. Whether, on the facts and in the circumstances of the case, the Tribunal is right in law in holding that the appellant is not entitled to relief under Section 80 IA of the Act in respect of AMC charges, other income and in erroneously adding back interest income?"

3. Heard Mr.M.P.Senthil Kumar, learned counsel for the appellant/assessee; and Ms.R.Hemalatha, learned Senior Standing Counsel for the respondent/Revenue.

4. So far as the second substantial question of law is concerned, the same has been decided against the assessee in the assessee's own case for the assessment year 2001-02 (M/s.Diebold Systems P. Ltd., vs. The Assistant Commissioner of Income Tax) in T.C.(A) No.596 of 2008, dated 24.06.2019, and the operative portion of the judgment read as follows:-

"12.This leaves us with the first issue, viz., deduction under Section 80IA of the Act on AMC (Annual Maintenance Charges of ATM) in respect of ATM machines sold.

13.As rightly pointed out by T.Ravi Kumar, the assessee was not able to establish before the Assessing Officer by producing records. The Assessing Officer after examining the facts of the case, found that the income earned from AMC (Annual Maintenance Charges of ATM), installation and technical charges, consultation charges and licence fee of software do not constitute income from the industrial undertaking which was established in Pondicherry, since this was not derived from the industrial undertaking, as the men, material and machinery of the Pondicherry industrial undertaking were not used to earn income and therefore, denied deduction under Section 80IA of the Act.

14.Mr.M.P.Senthil Kumar, learned counsel appearing for the appellant/assessee strenuously contended that the assessee cannot sell the ATMs unless they offer annual maintenance of the same. Further, it is contended that the assessee's business of production, sale, installation and maintenance of ATMs by providing necessary software is a very high security risk, as they dispense large amounts of cash. Further, it is submitted that in view of special type of machine, provision of maintenance service is an integral part of manufacturing and selling activity. The above submissions made by Mr.M.P.Senthil Kumar were never pleaded either before the Assessing Officer, or before the CIT(A) or before the Tribunal either in the same tenor or in a different manner. Therefore, such a plea cannot

be raised at this juncture. Even assuming they were raised earlier, when the assessee has miserably failed to establish the same before the fact finding authority, they cannot be permitted to raise such a contention before this Court for the first time. Therefore, the assessee has not made out any ground to interfere with the first issue as well. With regard to the first issue, there was an alternate claim made by the assessee stating that the expenditure incurred in carrying out annual maintenance work should be excluded while computing profit under Section 80IA of the Act. This issue was considered by the CIT(A) in paragraph 4.6 of the order dated 28.02.2005 and was rejected on the ground that there was no positive income from the Pondicherry unit.

15. Thus, for the above reasons, we are of the clear view that the assessee has not made out any ground to interfere with the impugned order passed by the Tribunal and the appeal is liable to be dismissed, as there is no substantial question of law arising for consideration. No costs."

5. Following the above decision, the second substantial question of law is answered against the assessee.

6. The first substantial question of law is regarding the validity of reopening the assessment.

7. The learned counsel appearing for the appellant argued that the assessment for the year under consideration, 1999-2000, was completed under Section 143(1) of the Act on 10.10.2000 accepting the income admitted in the revised return of income filed by the assessee. Having done so, the question of reopening the assessment by invoking the power under Section 147 of the Act does not arise, as what has been done by the Assessing Officer is clearly based on change of opinion.

8. The learned counsel placed reliance on the decision in the case of *M/s. Tanmac India vs. Deputy Commissioner of Income Tax*, [2016] 97 CCH 0189 ChenHC.

9. Ms. R. Hemalatha, learned Senior Standing Counsel for the respondent/Revenue submitted that this issue has been settled by the Hon'ble Supreme Court in *DCIT vs. Rajesh Jhaveri Stock Brokers Pvt. Ltd.*, reported in 295 ITR 499, the decision in the case of *DCIT vs. Zuari Estate Development and Investment Co Ltd.*, [Civil Appeal No(s).6758 of 2004, dated 17.04.2015] and the decision in the case of *Commissioner of Income-tax v. Kelvinator of India Ltd.* reported in [2010] 320 ITR 561(SC). There can be no dispute to the proposition as to the effect of an intimation given under Section 143(1) and the law has been well settled in the decision in *Assistant Commissioner of Income Tax vs. Rajesh Jhaveri Stock Brokers Pvt. Ltd.*, reported in (2008) 14 SCC 208 followed in *Zuari Estate Development and Investment Co Ltd.*

10.The case of the appellant/assessee largely rests upon the decision in Tanmac India (supra).

11.We have carefully perused the said decision and we find that the Court had followed the decision of the Delhi High Court in the case of CIT vs. Orient Craft Ltd. reported in (2013) 354 ITR 536.

12.In Tanmac India (supra), it was held that though notice under Section 143(1) of the Act was issued and the matter was allowed to rest at that stage, the Assessing Officer sought to reopen the assessment under Section 147 solely on the basis of return of income and enclosures thereto. Therefore, the Court held that unless there was a tangible material, based on which the Assessing Officer has reason to belief that any income chargeable to tax has escaped assessment, reopening could not have been done.

13.In Orient Craft Ltd. (supra), the facts were also identical to that of Tanmac India (supra) where, the intimation under Section 143(1) was issued and thereafter, the Assessing Officer did not proceed further, but the assessment was sought to be reopened under Section 147 of the Act based on the material available in the return and therefore, the Court held that it is nothing but a review of the earlier proceedings and abuse of power by the Assessing Officer which has been deprecated by the Hon'ble Supreme Court in Kelvinator of India Ltd. (supra).

14.In the instant case, the facts are entirely different and it is vividly clear on a perusal of the re-assessment order dated 16.03.2006 and the reason for reopening is based on the information which came to the notice of the Assessing Officer during the course of the assessment proceedings for the assessment year 2001-02 during which the Assessing Officer came to know that the assessee does not carry out any maintenance work from its industrial unit at Pondicherry. Thus, the reason for reopening in the instant case was based upon the tangible material which came to the notice of the Assessing Officer subsequent to the intimation under Section 143(1) of the Act. Therefore, the re-assessment initiated under Section 143(3) read with Section 147 is perfectly legal and valid. Consequently, we hold that the decision in Tanmac India (supra) and Orient Craft Ltd. (supra) cannot be applied to the assessee's case and the decisions of the Hon'ble Supreme Court in Rajesh Jhaveri Stock Brokers Pvt. Ltd. (2008) 14 SCC 208 and Zuari Estate Development and Investment Co Ltd., are a clear answer to the case of the assessee.

15.For the above reasons, the second substantial question of law is decided against the assessee.

16.In the result, the appeal is dismissed and the substantial questions of law are answered against the assessee. No costs.

Sd/-
Assistant Registrar

//True Copy//

Sub Assistant Registrar

To

- 1.The Income-tax Officer (OSD),
Company Circle I(4), Chennai.
121, Nungambakkam High Road, Chennai -34
- 2.The Commissioner of Income Tax (Appeals)-III,
121, Mahatma Gandhi Road, Chennai-600 034.
- 3.The Income Tax Appellate Tribunal, Chennai 'A' Bench.

+1cc to M/s.R.Hemalatha, Advocate SR.No.58793
+1cc to Mr.N.Muthukumar, Advocate Sr.No.59420

RSV(C.O.) / AKM/26.08.19 /5P-6C/

T.C. (A) No.2153 of 2008