IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 25.01.2019

CORAM

THE HON'BLE DR.JUSTICE VINEET KOTHARI

AND

THE HON'BLE DR.JUSTICE ANITA SUMANTH

Tax Case Appeal Nos.326, 327 and 336 of 2009

M/s.Fenner (India) Ltd.,
3, Madurai - Melakkal Road,
Madurai - 625 016

.... Appellant in the above T.C.(A)s

Vs

The Jt.CIT, Special Range II,
Madurai

.... Respondent in the above T.C.(A)s

Tax Case Appeals filed under Section 260A of the Income Tax Act, 1961 against the order of the Income Tax Appellate Tribunal, Madras 'C' Bench, Chennai, dated 09.12.2005 made in ITA Nos.364 /Mds/2001, 789/Mds/2000 and 566/Mds/2000 for the Assessment Years 1996-97 and 1995-96.

against the order of Commissioner of Income Tax (Appeals-IX, Chennai, dated 31.01.2000 in ITA.218; 1165/98-99; and Commissioner of Income Tax (Appeals) XIII dated 22.12.2000 in ITA.561/99-2000 and arising out of the Assessment Order of Deputy Commissioner of Income Tax, Special Range II, Madurai, dated 25.03.1998 & 22.03.1999 in PAN.GIR.No. 47-042 CX - 3977 and 47-042-CX-3977.

For Appellant : Mr.R.Venkatanarayanan
for M/s.Subbaraya Aiyar Padmanabhan

For Respondent : Mr.M.Swaminathan
Sr. Standing Counsel,

C O M M O N J U D G M E N T

(Delivered by DR.ANITA SUMANTH,J)

These Tax Case (Appeals) have been preferred by the assessee challenging the order of the Income Tax Appellate Tribunal (in short 'Tribunal') dated 09.12.2005.

2. The following common substantial questions of law have been raised and admitted by this Court for our adjudication in T.C.(A)Nos.326 and 336 of 2009:

> '1. Whether on the facts and in the circumstances of the case the Appellate Tribunal was right in law in holding that the scrap sales and miscellaneous receipts should be included in the total turnover for the purpose of computation of deduction under section 80HHC?
>
> 2. Whether on the facts and in the circumstances of the case the Appellate Tribunal was right in law in holding that the losses incurred by the industrial undertaking in the earlier years, which was adjusted against the income of other units in the earlier assessment years, has to be notionally carried forward and set-off against the income of the current assessment year for the purpose of computing deduction under section 80I of the Act?'

3. As far as substantial question of law No.1 is concerned, the first part of the question relating to inclusion of income from scrap sales in the total turnover for the purpose of computation of deduction under section 80HHC has been considered by us and answered in favour of the assessee in the case of M/s.Rajapalayam Mills Ltd., V. The Deputy Commissioner of Income Tax (T.C.A.No.342 of 2009 dated 02.01.2019) following the judgement of the Supreme Court in the case of Commissioner of Income Tax VII, New Delhi V. Punjab Stainless steel Industries ((2014) 15 SCC 129).

4. As far as the inclusion of income from miscellaneous receipts in the total turnover is concerned, the break-up of the same is not available in the orders of the lower authorities. Be that as it may, Mr.R.Venkatanarayanan, learned counsel appearing for the assessee does not press this question. The first substantial question of law is thus partly allowed, in favour of the assessee.

5. In so far as the second substantial question of law is concerned, both learned counsel submit that the same is covered

by the judgment of the Supreme Court in the case of ACIT V. Velayudhasamy Spinning Mills Ltd. ((2017) 244 Taxman 58). The second substantial question of law is answered in favour of the assessee.

6. T.C.(A)Nos.326 and 336 of 2009 relating to the assessment years 1996-97 and 1995-96 are partly allowed. No costs.

7. The following common substantial question of law has been raised and admitted by this Court in T.C.(A)No.327 of 2009 relating to assessment year 1995-96:

> '1. Whether on the facts and in the circumstances of the case the Appellate Tribunal was right in law in holding that the additional liability of bonus accruing under the Payment of Bonus Ordinance, 1995, cannot be allowed as a deduction in the current assessment year 1995-96 in the light of the specific provisions contained in the Ordinance itself to the fact that it came into force retrospectively on and from 01.04.1993?'

8. The assessee had made a provision for bonus of an amount of Rs.6,31,329/- in the financial year relevant to the assessment year in question. The claim for bonus was based on the liability as it stood on 31.03.1995. The liability was thereafter enhanced by the Parliament vide the Payment of Bonus (Amendment) Ordinance, 1995 (No.8 of 1995) effective, 01.04.1993. The Ordinance states as follows:

> '1. Short title and commencement. - (1) This Ordinance may be called the Payment of Bonus (Amendment) Ordinance 1995.
>
> (2) It shall be deemed to have come into force on the 1st day of April, 1993.
>
> 2. Amendment of section 2 - In section 2 of the Payment of Bonus Act, 1965 (21 of 1965) (hereinafter referred to as the principal Act), in clause (13), for the words "two thousand and five hundred rupees", the words "three thousand and five hundred rupees" shall be substituted.
>
> 3. Amendment of section 12 - In section 12 of the principal Act, for the words "one thousand and six hundred rupees" at both the places where they

occur, the words "two thousand and five hundred rupees" shall be substituted.'

9. Thus though the Ordinance was published in the Gazette on 09.07.1995 after the close of the accounting year, the applicability of the same was retrospective, with effect from 01.04.1993. The assessee thus made an additional provision to the extent of Rs.39,20,420/-, in line with the enhanced liability under the aforesaid Ordinance.

10. The Assessing Authority, vide order of assessment dated 25.03.1998, did not allow the provision on the ground that it did not relate to the assessment year in question. In appeal, the Commissioner of Income Tax (Appeals) (in short 'CIT(A)') allowed the ground of appeal reasoning that the claim of the assessee was based on the ordinance issued under the Payment of Bonus Act 1965 that raised the eligibility ceiling of salaries. Thus, notwithstanding that the liability related to the previous year, the additional liability over and the above the provision made earlier was admissible. The aforesaid order came to be challenged before the Tribunal by the revenue, that, vide the impugned order, reversed the order of the CIT(A) confirming the order of assessment.

11. The Tribunal reasoned that the liability had arisen on account of the Ordinance that were issued on 09.07.1995 and that such liability would thus commence only from the date when the Ordinance come into force. Having said so, the Tribunal failed to notice that the Ordinance in question came into force with effect from 01.04.1993.

12. We are of the view that the conclusion of the Tribunal, particularly in view of its own finding that the liability would commence from the date when the Ordinance came into force, is incorrect and liable to be reversed. In the present case, the Ordinance came into force from 01.04.1993 and as such, the assessee is entitled to the claim of Rs.39,20,420/- in the present assessment year. The assessee has also placed on record the computation of income for the assessment year 1996-97, which showed that the provision created was itself reversed in the subsequent assessment year and the amount offered to tax.

13. Reliance is placed by Mr.Swaminathan on the decisions of this Court in the case of Commissioner of Income Tax V. M/s.Vijayakumar Mills Ltd. (T.C.(A)No.835 of 2005 dated 18.09.2012) and Commissioner of Income Tax V. Dharmapuri Co-operative Sugar Mills Ltd. ((2000) 245 ITR 221) in support of his contention.

14. We have perused the said decisions and find the same distinguishable on facts. In the case of Vijayakumar Mills Ltd. (supra), a provision was made in respect of additional liability to bonus that arose pursuant to an agreement arrived at between the Management and Workers on 19.10.1991, after the close of the accounting year. Though the provision originally made was for a sum of Rs.36,80,000/-, the return of income filed on 27.12.1991 enhanced the amount to Rs.45,79,808/- based on the agreement. The excess sum of Rs.8,99,808/- was disallowed on the ground that the agreement was arrived at only in the subsequent accounting year and the claim could not be made in the financial year in question. The assessment was confirmed in first appeal and the Tribunal reversed the disallowance holding that it has been consistently taking the view that where the bonus has been paid in full to the employees before the due date, the same would be allowable even if the provision had been made later, after the end of the accounting year. In appeal under section 260A, a Bench of this Court reverses the order ofthe Tribunal restoring the disallowance.

15. The order of this Court refers to the agreement arrived at on 19.10.1991 which is between the Management and the Workers. There is also no finding to the effect that such argreement was made applicable retrospectively.

16. We are in the present case, however, concerned with an Ordinance promulgaged by the Parliament that, despite it having been published in the Gazette on 9th July, 1995, was made retrospectively applicable from 01.04.1993. This decision is thus distinguishable on facts.

17. Per contra, the assessee relies upon a decision of this Court in the case of Dharmapuri Co-operative Sugar Mills Ltd. (supra), wherein this Court considered the claim of sugar mills in respect of additional consideration towards purchase of cane after the close of the accounting year as well as purchase tax liability. The claim was negated by the Income Tax Officer, who held that the amount could not been reckoned for the year in which the cane had been received, but could be taken into account only in the subsequent year, that is when the payment had, in fact, been effected. The question raised for the consideration of the Bench was whether additional liability towards cane purchased and additional purchase tax as per Government Order dated 14.10.1982 was allowable as a deduction in respect of Assessment Year 1982-83.

18. The Bench concluded that the additional liability borne towards sale consideration as well as purchase tax, arose by virtue of the assessee having received the produce prior to 30th September, 1981. The quantification and discharge of liability

subsequently would not disentitle the assessee from claiming the amount as a deduction for the previous year. In that context, the Bench states thus:

> 'It is well settled that the liability for payment of tax, even though determined finally long after the end of the accounting year must be regarded as relating back to the time of which the liability for payment of tax had been incurred and that the date of determination of the final liability is not decisive as to the year for which the assessee can claim the deduction.'

19. We may also usefully refer to the observations of the Bench in the context of the mercantile system of accounting that the assessee followed in that case, as well as in the case on hand. The Bench observed that all liabilities that an entity incurred required to be reflected properly in the financial accounts in order to arrive at a correct ascertainment of profits. The mere fact that the liability in regard to manufacture or sale of products arose subsequent to the close of the accounting year would not mean that such liabilities or costs should not be taken into account to arrive at the profits in relation to said manufacture or sale. If this were done, it would distort the profits, which is not the object of the Act. In this view of the matter, the claim of the assessee was allowed.

20. We are of the view that the ratio of the decision in the case of Dharmapuri Co-operative sugar mills (supra) is applicable to the facts of the present case on all fours. The liability, as far as bonus is concerned, has been crystallised even prior to the due date for filing of return and hence the provision made for the present assessment year is in order.

21. Accordingly, the substantial question of law raised and admitted in T.C.(A)No.327 of 2009 is answered in favour of the assessee and against the Revenue. The Tax Case (Apeal) No.327 of 2009 is allowed. No costs.

Sd/-

Assistant Registrar

//True Copy//

Sub Assistant Registrar

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To

1.The Income Tax Appellate Tribunal, Madras 'C' Bench.

2.The Commissioner of Income Tax (Appeals) - XIII, Chennai.

3.The Joint commissioner of Income Tax,

Special Range II, Madurai.

4.The Deputy Commissioner of Income Tax Special Range II,

Madurai.

+1cc to Mr.S.Premalatha, Advocate, S.R.No. 5861

+2cc to Mr.Subbaraja Aiyar, Advocate, S.R.No. 6664 & 6662

Tax Case Appeal Nos.326, 327 and 336 of 2009

SSD(CO)

GN(22/02/2019)