IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 11.12.2019

CORAM

THE HONOURABLE MR.JUSTICE C.SARAVANAN

W.P. No. 28288 of 2011
and
M.P. No. 1 of 2011

M/s. Ambika Cotton Mills Ltd.,
Represented by its Chairman & Managing Director,
Sri. P.V. Chandran,
9A, Valluvar Street,
Sivanandha Colony,
Coimbatore - 641 012. ... Petitioner

Vs

Deputy Commissioner of Income Tax,
Company Circle - I (3),
Income Tax Office,
No.67A, Race Course Road,
Coimbatore - 641 018. ... Respondent

Prayer: Petition filed under Article 226 of the Constitution of India to issue a Writ of Certiorari, calling for the records in PAN No.AABCA8985E dated 11.11.2011 on the file of the Respondent relating to the Assessment Year 2004-2005 and quash the same.

For Petitioner : Mr. M.P. Senthil Kumar
for Mr. N. Muthu kumar

For Respondent : Mr. A.N.R. Jayaprathap
Government Advocate

ORDER

The Petitioner has filed this writ petition, seeking for issuance of a Writ of Certiorari, calling for the records in PAN No.AABCA8985E dated 11.11.2011 on the file of the Respondent relating to the Assessment Year 2004-2005.

2. The Petitioner is aggrieved by the impugned order dated 11/11/11 of the Respondent. By the impugned order, the Respondent has conveyed its decision overruling the objection filed by the Petitioner against the invocation of Section 148 read with Section 147 of the Income Tax Act, 1961 by the Respondent to re-open the assessment.

3. The Petitioner had filed a return under Section 139 of the Income Tax Act, 1961 on 21.10.2004 for the assessment year 2004-2005. Thereafter, an order of assessment also came to be passed on 29.09.2006 under Section 143 (3) of the Income Tax Act, 1961. The last date of the said financial year would have been 31.03.2005. Therefore, a notice to re-open the assessment within the normal period of limitation of 4 years under Section 148 read with Section 147 of the Income Tax Act, 1961 for income escaping assessment would have been issued before 31.03.2009.

4. However, at the fag end of the period of limitation of 6 years for invoking larger period of limitation, a notice was issued on 28.03.2011 to the Petitioner. Under these circumstances, the Petitioner sent a representation on 11.04.2011.

5. Thereafter, the notice under section 143 (2) of the Income Tax Act, 1961 was issued to the Petitioner fixing the hearing on 27.06.2011. Under these circumstances the Petitioner requested the Respondent to furnish reasons for invoking notice under section 148 of the Income Tax Act, 1961 in terms of the decision of the Honourable Supreme Court in GKN Drive Shafts (India) Ltd Vs Income Tax Officer, 2003 SCC 259/259 ITR 19.

6. The operative portion of the impugned order reads as under:-

> "(a) It is mandatory for the assessee to exercise option to claim higher depreciation under WDV method before filing the return of income under Section 139 (1). Even in the return of income filed in response to notice under Section 148 also, the assessee fails to exercise his option to claim higher depreciation. The intention of the lawmaker is clear that exercise of option means only an option in writing.

(b) If assessee is allowed to claim higher depreciation under WDV, then insertion of Section 32(1) and Rule 5 (1A) will not have any meaning. The insertion of this provision provides various options to the assessee to claim depreciation, out of which, the assessee has to exercise his option. In the instant case, the assessee has not exercised his option and mere inclusion of wind mills in 80% block of assets cannot be treated as exercise of option for claim of depreciation as per appendix I. This can be best be treated as misreading of the provisions rather than exercising the option as prescribed in the second proviso to Rule 5 (1A) of the Income-tax Rules.

(c) The above provisions are specific for power generation and distribution units. In general all assesses claims installation of wind mill as a seperate entity and also claims 80IA deductions stating it as business. Further, on perusal of agreement with Tamilnadu Electricity Board, it is noticed that these wind mills are also bound by the various provisions of the Electricity Act, 2003. Further, Board Circular No.772 dated 23.12.1998 clarifies that the depreciation on straight line basis under Appendix IA is meant only for those covered by the Electricity Act. Hence, installation of wind mills is also comes under the category of electricity companies only, so as the assessee has to exercise his option in writing to claim higher depreciation.

In view of the above, you are required to show cause your objections, if any, on or before 23.11.2011, why the additional depreciation claimed should not be withdrawn and added back to the total income."

7. Both the counsel fairly submitted that the issue squarely covered by the decision of the division bench of this court rendered in Commissioner of Income Tax Vs ABT Ltd, (2015) 370 ITR 159 (Mad) on merits. The Division Bench followed the decision of the Bombay High Court in Commissioner of Income Tax Vs Vijaya Hirasa Kalamkar (HUF), 229 ITR 772 wherein it was observed as follows:-

"3. Learned Standing Counsel appearing for the Revenue submits that the above-said issue is covered by a decision of this Court dated 09.09.2014 made in T.C.A. Nos. 330 of 2013 etc batch.

4. In the above-said decision, this Court, following the decision of the Bombay High Court reported in 229 ITR 772 (CIT Vs. Vijaya Hirasa Kalamkar (HUF), held as follows:-

"20. A reading of the above-said decision of the Bombay High Court makes it clear that if the assessee exercised the option in terms of second proviso to Rule 5(1A) of the Income Tax Rules at the time of furnishing of return of income, it will suffice and no separate letter or request or intimation with regard to of exercise of option is required. Since the returns are filed in accordance with Section 139(1) of the Income Tax Act and the form prescribed therein makes a provision for exercising an option in respect of the claim of the depreciation, no separate procedure is required, as contended by the department. We are in agreement with the reasoning of the Tribunal.

21. Accordingly, the question of law is answered in favour of the assessee and against the Revenue." "

8. If an assessee has exercised option in terms of Rule 5 (1A) of the Income Tax Rules, 1961 while filing the return's under section 139 of the Income Tax Act, 1961, it will suffice and no separate letter of request or intimation with regard to the exercise of option is required.

9. Since in this case the return was filed in accordance with Section 139 (1) of the Income Tax Act, 1961 exercising the option invocation of Section 148 read with 147 was without jurisdiction. Further, the issue is also covered by the decisions of the Courts referred to supra. Therefore, this writ petition deserves to be allowed in the light of the above decision. Accordingly, this writ petition is allowed. No cost. Consequently, connected miscellaneous petition is closed.

Sd/-
Assistant Registrar(CS VI)

//True Copy//

Sub Assistant Registrar

To

Deputy Commissioner of Income Tax,
Company Circle - I (3),
Income Tax Office, No.67A,
Race Course Road, Coimbatore - 641 018.

+1cc to M/s.A.P.Srinivas, Advocate sr.103526
+1cc to Mr. N. Muthu kumar, Advocate sr.103381

W.P. No. 28288 of 2011
and
M.P. No. 1 of 2011

rp(co)
nr 21/02/2020