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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

\+ **ITA 240/2019**

THE PR. COMMISSIONER OF INCOME TAX -CENTRAL-3 ..... Appellant

Through: Ms. Vibhooti Malhotra, Advocate

versus

ABHISAR BUILDWELL PVT. LTD. ..... Respondent

Through: Dr. Rakesh Gupta, Mr. Anil Agarwal, Mr. Somil Agarwal and Ms. Monika Ghai, Advocates

CORAM:
JUSTICE S.MURALIDHAR
JUSTICE TALWANT SINGH

O R D E R

% **24.07.2019**

1. This appeal by the Revenue is directed against an order dated 17th September, 2019 passed by the Income Tax Appellate Tribunal (ITAT) in ITA No. 823/Del/2015 for the Assessment Year (AY) 2011-12.

2. The appeal before the ITAT was by the Respondent Assessee which challenged the order dated 31st October, 2014 passed by the Commissioner of Income Tax (Appeals) [CIT (A)].

3. The brief facts are that there was a search conducted in the Dharampal Satyapal Group of cases (DS Group) on 21st January, 2011. It must be noted here that the parent company i.e. Dharampal Satyapal Ltd. (DSL) had a rubber thread unit in Agartala in Tripura. The present Assessee was formed

by the demerger of DSL, which was approved by this Court by an order dated 11th September, 2007.

4. During the course of assessment proceedings of DSL under Section 153A of the Income Tax Act, 1961 (the 'Act'), a special audit under Section 142 (2)A of the Act was ordered. In the report of such special audit, the special auditor noted that DSL had been demerged its Rubber Thread Unit and Flexible Packaging Unit and two companies viz., Abhisar Buildwell Pvt. Ltd. (the present Assessee) and Avichal Buildcon Pvt. Ltd. were respectively formed. On the date of the demerger i.e. 1st April, 2006, assets of the demerged unit (i.e. the Assessee) included the assets acquired out of the amount of excise duty exemption (accounted as deferred government grant in the books of DSL).

5. According to the Assessing Officer (AO), who passed the assessment order in respect of the Assessee company, the cost of said assets in the hands of the Assessee had to be 'Nil' as the entire cost of the assets had been met by the Central government. The AO referred to Explanation 10 to Section 43 (1) of the Act for this purpose. The case of the Assessee, however, was that it had come into existence as a result of a demerger approved by this Court and the value assigned to the assets was that which was reflected in the balance sheet which was used for the Assessee's business and shown in the demerger Scheme approved by this Court. According to the Assessee, Explanation 10 to Section 43(1) of the Act was not applicable to it. This contention was rejected by the AO and he disallowed the entire depreciation amount claimed by the Assessee.

6. The matter then travelled to the Commissioner of Income Tax (Appeals) [CIT(A)] by way of an appeal by the Assessee. The CIT (A) admitted the Audit Report as fresh evidence. In para 5.5 of the order dated 31st October, 2014, the CIT(A) held as under:

> "5.5 Considering the entire facts and circumstances of the case, I admit the audit report in form 10CCB as fresh evidence and the same has been examined by the assessing officer on merits as well. No further opportunity is required as such. I have considered the judicial pronouncement relied by Ld. AR that the audit report in form 10CCB can be submitted before the first appellant authority specially under the circumstances when loss was claimed in return of income which was converted into positive income by making addition by the assessing officer. Accordingly, the assessing officer is directed to allow deduction U/S 80lC as per law treating that the requirement of filing audit -report in form no. 10CCB is met.
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> Accordingly, this ground of appeal is allowed."

7. Although the CIT(A) allowed the deduction under Section 80 IC, the decision of the AO to not allow the depreciation claimed by the Assessee was affirmed. This led the Assessee filing an appeal before the ITAT to the extent that the CIT (A) had upheld the disallowance of depreciation. The ground urged by the Assessee was that this disallowance was without any incriminating material qua the Assessee being found during search.

8. It is seen from the impugned order of the ITAT allowing the Assessee's appeal that it has essentially gone by the fact that the Assessee would in any event be entitled to claim the benefit of statutory deduction under Section 80IC of the Act in terms of CBDT Circular No. 37/2016 dated 2nd

November, 2016. It was observed by the ITAT in Para 12 of the impugned order as under:

> "12. Bare perusal of the operative part of the Circular (supra) goes to prove that disallowance made by the assessee U/S 32 of the Act relating to business activity against which deductions have been claimed under Chapter VI-A, as in the instant case, results in enhancement of the profits of the eligible business and that deduction under Chapter VI-A is admissible on profits so enhanced by the disallowance. In these circumstances, the claim of depreciation made by the assessee company of Rs.6,40,38,391/- is allowable deduction and as such, the benefit of deduction u/s 80lC is allowable on profits enhanced by the disallowance made U/S 32 of the Act and in these circumstances, the claim of depreciation is revenue neutral."

9. It is interesting that as far as the present appeal by the Revenue is concerned, no issue has been urged regarding the benefit of Section 80IC of the Act being available to the Assessee. The only ground urged is regarding the Assessee being allowed to claim depreciation in respect of assets acquired by DSL prior to the demerger from out of the government grants made available to DSL in terms of Central Excise (CE) Tariff Notification No. 69/2003 dated 25th August, 2003 and CE Notification No. 8/2004 dated 21st January, 2004 as further amended by CE Notification No. 28/2004 dated 9th July, 2004.

10. Inasmuch as the Revenue does not question the availability of the benefit of the Section 80IC to the Assessee during the AY in question, as noted by the ITAT, the issue concerning depreciation has been rendered revenue neutral and, therefore, academic.

11. Consequently, while leaving the question raised by the Revenue open for consideration in an appropriate case, the Court sees no reason to interfere with the impugned of the ITAT. No substantial question of law arises.

12. The appeal is dismissed.

S. MURALIDHAR, J.

TALWANT SINGH, J.

JULY 24, 2019
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