

Santosh

***IN THE HIGH COURT OF BOMBAY AT GOA***

***TAX APPEAL NO.9/2014***

Commissioner of Income Tax  
Karnataka (Central) Bangalore,  
Controlling Office of Central Circle,  
Panaji).

..... Appellant.

Versus

M/s. Mukhtar Minerals Private Limited,  
having its office at B-2, B-3,  
Phase IA, Verna Industrial Estate,  
Verna, Goa.

..... Respondent.

Ms. Amira Abdul Razaq, Standing Counsel for the Appellant.

Mr. P. S. Rao, Advocate for the Respondent.

***Coram : M.S. Sonak &  
Dama Seshadri Naidu, JJ.***

***Dated : 28<sup>th</sup> September, 2020.***

**ORAL JUDGMENT** : (Per M.S. SONAK, J.)

Heard Ms. Razaq, the learned Standing Counsel for the Appellant and Mr. P. Rao, the learned Counsel for the Respondent.

2. This Appeal was tagged along with Tax Appeal No.26/2014, and by a common order dated 3<sup>rd</sup> September, 2014, the following substantial question of law was framed therein:

*“Whether on that facts and circumstances of the case, the*

*Tribunal is right in law in accepting the contentions of the Assessee without giving an opportunity to the Assessing Officer by way of a remand, particularly, when the Assessee has withdrawn the statement unsuccessfully without legal basis ?*

3. However, today, Ms. Razaq, the learned Standing Counsel for the Appellant points out that the aforesaid substantial question of law does not even arise in Tax Appeal No.9/2014 since, for the Assessment Year 2008-09, which is the subject matter of the present Appeal, there was no revised return filed by the Assessee. She, however, submits that the substantial questions of law to be found at paragraph 5A and 5B arise in this matter and having regard to the provisions of Section 260(5) of the Income Tax Act, 1961, this Court should now frame these questions and dispose of this Appeal by answering such questions in favour of the Revenue and against the Assessee.

4. Ms. Razaq points out that in the facts and circumstances of the present case, the provisions of Section 35E of the Income Tax Act, were not at all applicable. In any case, she points out that the findings recorded by the Commissioner of Income-tax (CIT) (Appeals) and the Income Tax Appellate Tribunal (ITAT) that an amount of Rs.5,00,00,000/- paid by the Assessee to the mining lessees constitutes revenue expenditure, are vitiated by total perversity. She points out that this amount of Rs.5,00,00,000/- was towards

obtaining right to mine and, therefore, this amount, under no circumstances, could be regarded as any revenue expenditure. She points out that the works like building of roads, offices, etc. had already been undertaken by the mining lessees and, therefore, it cannot be said that the Assessee had spent any amounts for these purposes. She submits that since the findings recorded by the CIT (Appeals) and the ITAT are vitiated by perversity and misreading of clear evidence on record, the substantial question of law at 5.A arises and the same is required to be answered in favour of the Revenue and against the Assessee.

5. Ms. Razaq then submits that both, the CIT(Appeals) and the ITAT, had misconstrued the provisions in Section 68 of the Income Tax Act. She points out that the material on record establishes that M/s. Balaji Minerals and M/s. Matha Minerals were fictitious entities and despite opportunities, the Assessee failed to produce proprietors of such entities to whom huge amounts are alleged to have been paid by the Assessee. She points out that there is no material on record that Lokayukta of Karnataka had made any orders against the entities, on account of which the proprietors of these entities had made themselves scarce. She points out that merely because any payments made to these entities by cheques, does not mean that the Assessee were exempted from explaining the precise nature of such payments by adducing credible evidence. For all these reasons, she submits that the substantial question of law at

paragraph 5.B is required to be framed and answered in favour of the Revenue and against the Assessee.

6. Ms. Razaq, in support of her contentions, relied upon the following decisions :

- (I) *Commissioner of Income-tax, Panaji, Goa vs. Zuari Industries Ltd.*<sup>1</sup>;
- (II) *Sumati Dayal vs. Commissioner of Income-tax*<sup>2</sup>; and
- (III) *Killick Nixon Ltd. vs. Deputy Commissioner of Income, Central Circle (3)*<sup>3</sup>.

7. Mr. Rao, the learned Counsel for the Respondent points out that since the substantial questions of law at paragraph 5.A and 5.B were never framed by this Court at the time of admission of the Appeal, the same are deemed to have been rejected. In any case, he points out that the issues now raised by the Revenue, are the issues in respect of which there are concurrent findings recorded by the CIT(Appeals) and the ITAT. He points out that such concurrent findings are consistent with the evidence on record and, therefore, no case of perversity has been made out, so as to raise any substantial question of law. He relies upon the reasonings in the orders of the CIT (Appeals) and the ITAT and submits that this Appeal may be dismissed.

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<sup>1</sup> [2020] 115 taxmann.com 337 (Bombay)

<sup>2</sup> [1995] 80 TAXMAN 89 (SC)

<sup>3</sup> [2012] 20 taxmann.com 703 (Bom.)

8. The rival contentions now fall for our determination.

9. In this case, rather than going by the technical objections raised by Mr. Rao, we propose to examine whether the substantial questions of law at paragraph 5.A and 5.B in fact arise in the facts and circumstances of the present case.

10. The two substantial questions of law, now proposed by Ms. Razaq, read as follows :

*5.A. Whether on the facts and circumstances of the case the Tribunal is right in law in allowing an amount of Rs. 50,00,000/- under Section 35E of the Income Tax Act ?*

*5.B. Whether on the facts and circumstances of the case, the Tribunal is right in law in deleting the addition of Rs.13,66,35,554/- made by the Assessing Officer under Section 68 of the Income Tax Act ?*

11. The material on record, does indicate that the amount of Rs.5,00,00,000/- paid by the Assessee to the mining lessees, was not towards acquisition of right in the mine, but was basically towards the expenditure undertaken by the said lessees for the purpose of developments like roads and trenches, temporary huts, drilling, etc. In addition to this amount, the agreement provided that the Assessee, upon extraction of the ore, had to share 40% of the extracted ore with the mining lessees. Both, the CIT (Appeals), as well as the

ITAT, have examined, in some details, the scope of the agreement between the parties, as well as the nature of this payment of Rs.5,00,00,000/-.

12. Both, the CIT (Appeals), as well as the ITAT, concurrently held that in view of the agreement and the transactions between the parties, the provisions of Section 35E of the Income Tax Act, were indeed attracted. Consequent thereof, some benefits have been extended to the Assessee. In fact, the benefit extended to the Assessee is much lesser than what was applied for by the Assessee. This is on the basis of a correct reading of the provisions in Section 35E of the Income Tax Act.

13. Therefore, this is basically the case, where both the CIT (Appeals), as well as the ITAT have recorded the concurrent findings of fact as to the nature of payment made by the Assessee. Taking into consideration the material on record, it is not possible to say that these findings of fact suffer from any perversity, so as to give rise to the substantial question of law at paragraph 5.A, as proposed by Ms. Razaq.

14. Similarly, in so far as addition under Section 68 of the Income Tax Act is concerned, it is necessary to note at the out set, that, Section 68 applies to a situation where any sum is found credited in the books of an Assessee maintained for any previous year,

and the Assessee offers no explanation about the nature and source thereof or the explanation offered by him is not, in the opinion of the Assessing Officer, satisfactory, the sum so credited may be charged to income-tax as the income of the Assessee of that previous year.

15. In this case, the AO, no doubt, recorded that he is not satisfied with the explanation furnished by the Assessee. However, the said dissatisfaction was on the sole basis that the two entities M/s. Balaji Minerals and M/s. Matha Minerals did not respond to the notices or otherwise appear and confirm the purpose for which such payments were made. The CIT (Appeals), as well as the ITAT, on the other hand, have held that the AO could not have arrived at such a satisfaction focusing almost entirely on this sole circumstance, but rather, several other circumstances emanating from the record, were also required to be taken into consideration by the AO for deciding whether the explanation offered by the Assessee deserved acceptance.

16. Both, the CIT (Appeals) as well as the ITAT, held that the Assessee in this case had offered explanation as to why two entities or their proprietors could not give any statement in these proceedings. The two authorities have pointed out that the payments were made to these two entities by cheques. The two authorities have also pointed out that even the Revenue has accepted that the purchases were made by the Assessee from such entities and it is in

respect of such purchases that the Assessee made payments to the said parties. Therefore, by taking into consideration these aspects, including the quantum of profits which the Assessee had derived out of the purchases from these parties, concurrent findings came to be recorded that the explanation offered by the Assessee was indeed satisfactory and could not have been rejected.

17. According to us, it cannot be said that the concurrent findings on the second issues suffer from any perversity. The two authorities were quite justified in observing that the AO should not have focused almost entirely on the solitary circumstance and thereby failed to even look into several other circumstances on record, which rendered the Assessee's version plausible.

18. The decision in *Zuari Industries Ltd.* (supra) cannot be said to be applicable to the facts and circumstances of the present case. In the said case, there was overwhelming evidence that the payments made were for acquisition of mining lease.

19. In *Sumati Dayal* (supra), the Hon'ble Supreme Court held that where any sum is found credited in the books of the Assessee for any previous year, the same may be charged to income-tax as the income of the Assessee of that previous year if the explanation offered by the Assessee about the nature and source thereof is, in the

opinion of the Assessing Officer, not satisfactory. In such case, there is *prima facie* evidence against the Assessee, viz., the receipt of money and if he fails to rebut the same, the said evidence being unrebutted, can be used against him by holding that it is a receipt of an income nature. The Hon'ble Supreme Court has further held that while considering the explanation of the Assessee, the department cannot, however, act unreasonably and the matter has to be considered in the light of human probabilities.

20. In this case, as noted earlier, both the CIT (Appeals), as well as the ITAT have considered the explanation offered by the Assessee in the light of several circumstances to which they have adverted to. Upon consideration of such several circumstances borne out from the record, the two authorities have concurrently held that the explanation offered by the Assessee was more than probalilized. These are concurrent findings of fact. Besides, as held by the Hon'ble Supreme Court in *Sumati Dayal* (supra), the explanations in the context of Section 68 of the Income Tax Act have to be considered in the light of human probabilities and the explanations cannot be unreasonably rejected. Thus, the decision in *Sumati Dayal* (supra), to a certain extent, supports the case of the Assessee rather than the Revenue.

21. The decision in *Killick Nixon Ltd.* (supra) also turns on its

peculiar facts where there were concurrent finding of fact that the transaction in question was a sham and not genuine transaction. In these circumstances, it was held that there was no question of law to be considered. In the present case, there are concurrent findings of fact. Since no case of perversity has been made out, there arises no substantial question of law which would warrant consideration in the present case.

22. For all the aforesaid reasons, we dismiss this Appeal as, according to us, it raises no substantial question of law for consideration

23. There shall, however, be no order as to costs.

***Dama Seshadri Naidu, J.***

***M.S. Sonak, J.***