IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 28.01.2020

CORAM

THE HON'BLE DR.JUSTICE VINEET KOTHARI
AND
THE HON'BLE MR.JUSTICE R.SURESH KUMAR

Tax Case Appeal No.1199 of 2010

The Commissioner of Income Tax-II
Coimbatore.
... Appellant/ Respondent

Vs.

M/s.Lakshmi Machine Works Ltd.,
Perianaickenpalayam,
Coimbatore - 641 020.
PAN AAACL5244N ... Respondent/ Appellant

Appeal filed under Section 260A of the Income Tax Act, 1961 against the order of the Income Tax Appellate Tribunal 'C' Bench, Chennai dated 04.06.2010 passed in I.T.A.No.1926/Mds/2008 Appeal Against the order dated 09.06.2008 made in C.NO.220(1)/08-09/CIT-II/CBE passed by the Commissioner of Income Tax Appeals II, Coimbatore against the order dated 09.11.2006 made in PAN AAACL5244N Passed by the Assistant commissioner of Income Tax Company Circle IV(2), Coimbatore.

For Appellant : Mr.T.R.Senthil Kumar
Senior Standing Counsel

For Respondent : Mr.Venkat Narayanan
For Subbaraya Aiyar Padmanabhan

JUDGMENT

(Judgment of the Court was delivered by DR.VINEET KOTHARI, J.)

The Revenue has preferred this Appeal under Section 260A of the Income Tax Act, 1961 (in short 'Act') aggrieved by the order of the learned Income Tax Appellate Tribunal dated 04.06.2010 for Assessment year 2005-06. The following questions of law were admitted by the Coordinate Bench of this Court vide order dated 01.02.2011:

"1.Whether on the facts and in the circumstances of the case, the Income-tax Appellate Tribunal was right in law in quashing the order passed under section 263 of the Income Tax Act, 1961, even though the Assessing Officer is allowed the claim of carried forward of losses under section 72A, based on an incorrect assumption of facts is valid?

2.Whether on the facts and in the circumstances of the case, the Income-tax Appellate Tribunal was right in law in holding that the Commissioner of Income-tax has not given show cause notice in respect of the issue of additional depreciation on Wind Mill and consequently the direction given by the Commissioner of Income-tax on this issue is void on account of lack of jurisdiction, even though the assessee furnishing his reply to show cause notice, has included in respect of additional depreciation on Wind Mills? and

3.Whether on the facts and in the circumstances of the case, the Income-tax Appellate Tribunal was right in law in holding that the assessee is entitled to additional depreciation on the purchase of Wind Mills under Section 32(1)(iia) of the Income-tax Act, 1961 even though the main business of the assessee is not producing or generating of electricity?"

2.Both the learned counsels fairly submitted that both the issues viz., powers under Section 263 of the Act and additional depreciation of the Wind Mill are now covered by two separate judgments of this Court against the Revenue.

In the case of The Commissioner of Income Tax-II Vs. Lakshmi Machine Works Ltd., Coimbatore [in T.C.A.No.747 of 2009 dated 13.02.2019] wherein a Coordinate Bench of this Court (in which one of us, Dr.Vineet Kothari, J. was a Member] held as under:

"13. The provisions of Section 32(2) of the SICA as well as 72A of the Act and the interplay thereof came to be considered by the Supreme Court in the case of Indian Shaving Products Ltd (supra). The Bench was considering an appeal against an order of the Appellate Authority for Industrial and Financial Reconstruction upholding an order of the BIFR refusing to grant the benefit of the provisions of Section 71 (a) of the Income Tax Act to the appellant upon amalgamation and sanction of a scheme by the BIFR.

14. After noting that that BIFR had been enacted in public interest, with a view to secure timely detection of sick and potentially sick companies owning industrial undertakings and to determine preventive, ameliorative, remedial and other measures required to be taken with respect to such companies, the Bench considered the various provisions of the SICA, in specific Section 32(2).

15. Reference is made to the judgement of the Supreme Court in the case of Commissioner of Income Tax and others vs. Mahindra and Mahindra and Others (144 ITR 225) that considered a challenge to Section 72 A. The following paragraph from the judgement in Mahindra's case has been particularly noted and extracted:

'Before undertaking a scrutiny of these reasons for ultimately deciding whether the impugned conclusion of the Specified Authority and the Central Government is liable to be interfered with or not it will be useful to indicate briefly the object with which this new provision of s. 72A was introduced in the Act as it will throw light on what was the mischief or situation that was intended to be remedied by its introduction as also the true concept of financial Don- viability. From the budget speech of the Finance Minister, the Notes on Clauses of the Finance Bill (No. 2) of 1977 and the Memorandum explaining to provisions of the said Bill it will appear clear that sickness among industrial undertaking was regarded as a matter of grave national concern inasmuch as closure of any sizable manufacturing unit in any industry entailed social costs in terms of loss of production and unemployment as also waste of valuable capital assets, and experience had shown that taking over of such sick units by Government was not always a satisfactory or economical solution; it was felt that a more effective method would be to facilitate amalgamation of sick industrial units with sound ones by providing incentives and removing impediments in the way of such amalgamation which would not merely relieve the Government of uneconomical burden of taking over and running sick units but save the Government from social costs in terms of loss of production and unemployment. With such objective in view, in order to facilitate the merger of sick industrial units with sound ones and as and by way of offering an incentive in that behalf s. 72A was introduced in the Act where under by a deeming fiction the accumulated loss or unabsorbed depreciation of the amalgamating company is treated to be a loss or, as the case may be, allowance for depreciation of the amalgamated company in the previous year in which the amalgamation was effected; but the amalgamated company, although a successor in interest, would be entitled to carry forward and set-off the accumulated loss and unabsorbed depreciation of the amalgamating company only where the amalgamating company was not, immediately before such amalgamation, financially viable and the amalgamation was in public interest. The expression "financial non-viability" had not been defined in the Act but the Finance Minister's speech, the notes on Clauses of the Bill and the Memorandum explaining the provisions thereof make it clear that the financial non-viability of an undertaking has been equated with the 'sickness' of such undertaking and obviously in the context of its revival by a sound undertaking the sickness must be of a temporary character and not any basic or permanent sickness. An undertaking which is basically or potentially non-viable will ordinarily be incapable of revival and would face a closure; in other words, the financial non-viability spoken of by the section must refer to sickness brought about by temporary adverse financial circumstances that disables the unit to stand and work on its own. This is also made clear by the provision contained in cl. (a) of sub-s. (1) which states that the financial non-viability of the amalgamating company has to be judged by reference to "its liabilities, losses and other relevant facts'.

16. The above judgment was rendered prior to coming into force of SICA in terms of which the BIFR was constituted, in an era when sanction was specifically required to be given by the Central Government upon recommendation of the Specific Officer thereunder. Thus, financial viability or otherwise, of the amalgamating company had to be determined first, in order to attract the provisions of Section 72A. However, after the enactment of the SICA and the Constitution of the BIFR, the question of sickness or robust health of the entity is to be determined by the Board. It is only when the Board was satisfied that it would have, in the first place, entertained applications for revival,

sanctioning appropriate schemes for rehabilitation. Thus, a sanction by the BIFR implies that the requirements of Section 72(2) of the Act have been met.

17. This provision, and the interplay thereof with the provisions of the Income tax Act has been considered by the Supreme Court in the case of Indian Shaving Products (supra) where at paragraph 7 the Bench holds as follows:

'7.Under Section 72 of the Income Tax Act, to give to the amalgamated Company the benefit of the loss or, as the case may be, allowance for depreciation of the amalgamating company for the previous year in which the amalgamation was effected for the purposes of the Income Tax Act, the Central Government must, upon the recommendation of the specified authority, be satisfied that the amalgamating company was not, immediately before the amalgamation, financially viable by reason of its liabilities, losses and other relevant factors, and that the amalgamation was in the public interest, By reason of Section 32 (2) of the said Act, where there has been under any scheme thereunder an amalgamation of a sick industrial company with another company, the provisions of Section 72A of the Income Tax Act shall apply in relation to such amalgamation, subject to this modification that the power of the Central Government is to be exercised by the BIFR without the necessity of a recommendation by the specified authority mentioned in Section 72A of the Income Tax Act. This is because, for the purposes of according sanction to a scheme of amalgamation of a sick industrial undertaking with any other company under Section 18 of the said Act, the BIFR has to be satisfied that the amalgamating company is not financially viable, which is the effect of Section 3 (o) of the said Act, and that the amalgamation is necessary or expedient in the public interest, which is the effect of Sections 17 and 18 of the said Act read together. Sanction of a scheme of amalgamation under Section 18 of the said Act necessarily implies that the requirements of Section 72A o f the Income Tax Act have been met and the BIFR must exercise the power conferred upon it by Section 3 2 (2} of the said Act and make the declaration contemplated by Section 7 2A o f the Income Tax Act, The conditions for sanctioning a scheme under Section 18 o f the said Act being the same as those required for a declaration under Section 72A o f the Income Tax

Act, the BIFR could not have sanctioned the scheme of amalgamation of Sharp Edge with the appellant but declined to make the declaration under Section 72A o f the Income Tax Act with regard to t hat amalgamation' (underlining for emphasis, ours)

18. Nothing further remains to be said in the light of the categoric conclusion of the Supreme Court emphasised above. The view taken by the Assessing Authority to the effect that the claim of the assessee is liable to be allowed in the light of the provisions of section 32(2) of the SICA and its interpretation by the Supreme Court is thus, the correct one.

19. The jurisdiction exercised by the CIT to correct the alleged error in assessment was in terms of section 263 of the Act. Section 263 empowers the Commissioner of Income tax to revise an order of assessment if the order in question is erroneous and prejudicial to the interests of the revenue, both conditions to be satisfied concurrently. The action of the assessing officer, though prejudicial, can hardly be termed as 'erroneous' in so far as the officer has followed the dictum laid down by the Supreme Court in the case of Indian Shaving products (supra). Thus, in the absence of concurrent satisfaction of the two conditions under section 263 of the Act, the action of the CIT was contrary to statute and liable to be set aside."

3.Accordingly, Question No.1 is answered against the Revenue and in favour of the Assessee in same terms."

4.As far as the other two questions on the additional depreciation on the Wind Mill is concerned, a Coordinate Bench of this Court [in which one of us, R.Suresh Kumar, J. was a Member] has held as under:

"7.In so far as the first submission advanced by Mr.Ravi is concerned, according to us, the same is completely untenable.

7.1.The judgment of the Division Bench of this Court in M.M.Forgings Limited Vs. Additional Commissioner of Income Tax, did not deal the issue, which is at hand.

7.2.The issue, in hand, is as to whether balance additional depreciation could be carried forward to the year, following the previous year, in which, additional depreciation was claimed.

7.3.The Division Bench in M.M.Forgings case the said case was not concerned with the issue, with which, we are faced, that is, the right to carry forward the balance additional depreciation. Therefore, the judgment is completely distinguishable.

8.The second submission of Mr.Ravi, that Circular no.8 of 2002 dated 27.08.2002 and Circular no.281 dated 29.11.1979, have not been taken note of, in our judgment rendered in Commissioner of Income Tax, Madurai Vs. M/s.Shri T.P.Textiles Private Limited, according to us, will not impact, either the reasoning or the conclusion reached by us, in the said matter.

8.1.It is pertinent to note that the Circular no.281 dated 29.11.1979, pre-dates the insertion of the relevant provision, i.e., second clause to Section 32 (1) (iia). The said clause (iia), admittedly, was inserted by virtue of the Finance (No.2) Act, 2002, with effect from 01.04.2003.

8.2.In so far as the second Circular is concerned, i.e, Circular no.8 of 2002 dated 27.08.2002, in our view, in no way, helps the case of the Revenue. The Circular does not dwell on the point which we are confronted with.

8.3.In any case, according to us, the Circulars are not binding on the Court, though, they may be binding on the Revenue. [See CIT V. Hero Cycles Pvt. Ltd., (1997) 228 ITR 463 (SC)].

9.The last submission that Mr.Ravi advanced, was, in fact, predicated on the reasoning given by the Assessing Officer, which, according to us, is misconceived, as the manner of calculation of depreciation, cannot, to our minds, impede the claim of the Assessee for balance additional depreciation, in the year following the previous year, in which, the said asset is installed and put to use.

10.Therefore, for the aforesaid reasons, we find no merit in the submissions advanced by the Revenue."

5.A similar view was expressed by this Court in another judgment in the case of Commissioner of Income Tax V. VTM Limited [T.C.A.No.881 of 2009 dated 08.09.2009] wherein at paragraphs 5 and 6 are held as under:

"5. In the case on hand, the assessee is stated to have set up a wind mill at a cost of Rs.5,85,60,000/- It is true that the assessee is a company engaged in the business of manufacture of textile goods. As far as application of Section 32 (1)(iia) of the Act, is concerned, what is required to be satisfied in order to claim the additional depreciation is that the setting up of a new machinery or plant should have been acquired and installed after 31st March 2002 by an assessee, who was already engaged in the business of manufacture or production of any article or thing. The said provision does not state that the setting up of a new machinery or plant, which was acquired and installed upto 31.03.2002 should have any operational connectivity to the article or thing that was already being manufactured by the assessee. Therefore, the contention that the setting up of a wind mill has nothing to do with the power industry, namely, manufacture of oil seeds etc. is totally not germane to the specific provision contained in Section 32(1)(iia) of the Act.

6. In such circumstances, we are not able to appreciate the contention of the learned standing counsel for the appellant on the ground that the order of the Commissioner of Income-tax (Appeals) as confirmed by the Tribunal should be interfered with. It cannot also be said that setting up of a wind mill will not fall within the expression setting up of a new machinery or plant. We do not find any error in the conclusion of the Tribunal in confirming the order of the Commissioner of Income-tax (Appeals). We, therefore, do not find any question of law much less substantial question of law to entertain this appeal. The appeal fails and the same is dismissed. No costs."

6.In view of the aforesaid, Questions No.2 and 3 also deserve to be answered against the Revenue and in favour of the Assessee. We hereby do so.

7.Accordingly, the present Appeal filed by the Revenue is disposed of in aforesaid terms. There shall be no order as to costs.

Sd/-
Assistant Registrar(CS VIII)

//True Copy//

Sub Assistant Registrar

Sgl

To
The Income Tax Appellate Tribunal,
'C' Bench, Chennai.

2.The Commissioner of Income Tax Appeals II, Coimbatore.

3.The Assistant commissioner of Income Tax Company Circle IV (2),Coimbatore.

+1cc to Mr.T.R.Senthil Kumar , Advocate SR.No. 6584
+1cc to Mr.Subbaiya Aiyar , Advocate SR.No. 6582

T.C.A.No.1199 of 2010

A.SK(04/03/2020)