

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 15.10.2020

CORAM

THE HONOURABLE DR. JUSTICE VINEET KOTHARI
AND
THE HONOURABLE MR.JUSTICE M.S. RAMESH

T.C.A. No. 411 of 2013

Commissioner of Income Tax,
Coimbatore.

..Appellant

Vs.

M/s. JSW Steel Ltd (Successor to
Southern Iron & Steel Company Ltd
Pottaneri - M Kalapatt Village,
Mecheri, Mettur Taluk, Salem 636 454.

..Respondent

Prayer: Tax Case Appeal as against the order of the Income Tax Appellate Tribunal, Madras 'B' Bench, dated 28.09.2012 in ITA No. 1404/Mds/2012, against the order dated 29/03/2012 made in C No.120(5)263 -sis CL/CIT-1 CBE/11-12 on the file of the Commissioner of Income Tax -1, Coimbatore for the Assessment year 2007-2008 , against the order dated 23/09/2009 made in P.A.No./G.I R No.AAECS3306E on the file of the Assistant Commissioner of income Tax, Company Circle-1(1), Coimbatore.

For Appellant :: Ms.S. Premalatha
Junior Standing Counsel
For Respondent :: Mr.P.J. Sri Ganesh

O R D E R

(By DR. VINEET KOTHARI, J.)

This Tax Case Appeal has been filed by the Revenue against the order of the Income Tax Appellate Tribunal, Madras 'B' Bench dated 28.09.2012 allowing the Assessee's Appeal for the Assessment Year 2007-2008.

2. The Appeal before the learned Tribunal was directed against the order passed by the learned Commissioner of Income Tax under Section 263 of the Income Tax Act, 1961 ('the Act' in short) in which the learned Commissioner of Income Tax, invoking

Section 263 of the Act, held that the Pre-Operative Expenses of Rs.3487.18 lakhs as per Schedule-6 to the audited Profit & Loss Account is not covered by Section 35D of the Act and the expenses are required to be capitalised with the block of depreciable assets. The relevant portion of the order of the learned Commissioner of Income Tax is quoted below for ready reference:

"4.0 The ARs were heard. The foregoing written submissions were duly considered. The assessee's stand is that, the expenditure in question, i.e, pre-operative expenses are not covered by the provisions of the Sec-35D of the Act, and, therefore, are allowable wholly in computing the Total Income; and, therefore, the AO passing the "order under consideration" had allowed. Accordingly, there is no error within the meaning of the Sec-263 of the Act, "order under consideration."

4.1 I agree with the AR that, the Pre-operative Expenses is/are the expenses) which are incurred by an assessee prior to commencement of its business are not covered by Sec-35D of the Act. But, such expenses are required to be capitalized with the block of depreciable assets. In view of such, the assessee's case merits the verification of the income of RS.3487.18 lakhs (as per the Schedule-6 to the audited P&L a/c of the 'Annual General Report: 2006-2007) to ascertain its allowability or otherwise in computing the assessable income, for the AY: 07-08. The AO is directed accordingly.

5. Thus, 'the order under consideration'[passed u/s-143(3) dt: 23-9-10] is, hereby, set-aside with directions to the Assessing Officer to re-do the assessment afresh, with reference to the observations inter alia, as per law and procedure, and after hearing the assessee."

3. The details and break-up of the said amount of Rs.3487.18 lakhs is given paragraph No.3.1 of the same order and the learned Commissioner of Income Tax had, prima facie, noted that it was not an expenditure claimed by the Assessee, but was, on the other hand, a receipt in the hands of the assessee on account of sale of surplus power to TNEB from captive power plant and distribution of power to Steel Plant from captive power plant for its own use. The said details as given in paragraph No.3.1 are quoted below for ready reference:

"At the outset, it is submitted that the brea-up of Rs-3487.18(Rs, in lakhs) is as under:

i. Sale of surplus power to TNEB from captive power plant	:	282.22
ii. Distribution of power to Steel plant from captive power plant	:	1844.50
iii. Transfer of coke to blast furnace from coke oven plant	:	1360.46
Total		3487.18

However, paragraph No.4.1 of the order of the learned Commissioner of Income Tax in the paper book, quoted above, contains a manual correction by the learned Commissioner in which the word 'expenses' has been struck out and the word 'income' is handwritten by the learned Commissioner.

4. Before the learned Tribunal, the Assessee filed an Appeal against the order under Section 263 of the Act and the learned Tribunal allowed the Appeal of the Assessee and held that the learned Commissioner of Income Tax could not invoke his powers under Section 263 of the Act for revising the original order. The relevant part of the order of the Income Tax Appellate Tribunal is also quoted below for ready reference:

"5. We have heard the rival submissions and perused the orders of the lower authorities and materials available on record. In the instant case, original order of assessment u/s 143(3) was passed on 23.09.2009 assessing total income of the assessee at NIL. Thereafter the CIT issued a show cause notice u/s 263 of the Act dated 11.5.2011 and the relevant issue raised by the CIT in the said notice is extracted as under:

"2.1. As per Sec-35D of the Act pre-operative expenditure is to be amortized for five years; and, accordingly, claimed as deductions in five equal installments after commencement of business. Therefore the entire trial-run-income is to be treated as revenue receipt of the year of the receipt. But the AO, in the 'order under consideration' has omitted to so assess resulting in an error which is prejudicial to the interests of the Revenue. In view of such, it is proposed to invoke provisions of the Section-263 of the Act on the 'order under consideration' to remedy loss to the Revenue."

6. Thus, from the show cause notice, it is observed that the proceedings u/s 263 were initiated as in the opinion of the CIT ₹3487.18 lakhs was the income of the assessee assessable to tax for the year consideration which was omitted to be assessed in the assessment order. The CIT, after considering the submissions of the assessee on this issue which was to the effect that out of ₹3487.18 lakhs, ₹3204.98 lakhs represents inter-divisional transfer of the assessee's units only in which no assessable income element is embedded and the balance amount of ₹282.22 lakhs which represented sale of power to TNEB has corresponding expenditure of more than that amount i.e, 483 lakhs, the CIT ordered u/s 263 as under:

"4.0 The ARs were heard. The foregoing written submissions were duly considered. The assessee's stand is that, the expenditure in question, i.e, pre-operative expenses are not covered by the provisions of the Sec-35D of the Act, and, therefore, are allowable wholly in computing the Total Income; and, therefore, the AO passing the "order under consideration" had allowed. Accordingly, there is no error within the meaning of the Sec-263 of the Act, "order under consideration."

4.1 I agree with the AR that, the Pre-operative Expenses is/are the expenses) which are incurred by an assessee prior to commencement of its business are not covered by Sec-35D of the Act. But, such expenses are required to be capitalized with the block of depreciable assets. In view of such, the assessee's case merits the verification of the income of Rs.3487.18 lakhs (as per the Schedule-6 to the audited P&L a/c of the 'Annual General Report: 2006-2007) to ascertain its allowability or otherwise in computing the assessable income, for the AY: 07-08. The AO is directed accordingly.

5. Thus, 'the order under consideration'[passed u/s-143(3) dt: 23-9-10] is, hereby, set-aside with directions to the Assessing Officer to re-do the assessment afresh, with reference to the observations inter alia, as per law and procedure, and after hearing the assessee."

7. We find that the order ultimately has been passed to verify the expenses of ₹3487.18 lakhs to ascertain its liability or otherwise in computing the assessable income for the assessment year 2007-08.

8. Firstly, we find that no show cause notice was issued in respect of expenses of ₹3487.18 lakhs. Further, even it is assumed that income of ₹3487.18 lakhs referred in show cause notice issued u/s 263 was ordered by the CIT to be verified by the Assessing Officer then also we find that instant order passed u/s 263 is not sustainable as the CIT could not point out any error in the submissions of the assessee in respect thereto. Though the CIT has quoted the submissions of the assessee that no assessable income was established in the receipt of ₹3487.18 lakhs but the CIT has not disputed the said submissions of the assessee. In the above circumstances, the order of the CIT is without jurisdiction inasmuch as no show cause notice was issued in respect of expenses of ₹3487.18 lakhs and no error in the submissions of the assessee in respect of receipt of ₹3487.18 lakhs was pointed out by the CIT. We, therefore, cancel the order of the CIT passed u/s 263 of the Act on 29.3.2011 and allow the appeal of the assessee.

9. In the result, the appeal of the assessee is allowed."

5. The learned counsel for the Revenue primarily submitted that the learned Tribunal has wrongly interpreted it to be a case of 'expenditure' to the extent of Rs.3487.18 lakhs whereas from the manual correction made in the order of the learned Commissioner of Income Tax, it was clear that it was a case of 'income' in the hands of the Assessee and the taxability of the same was to be determined.

6. The learned counsel for the Assessee was also not able to explain the basic difference in the order of the learned Commissioner of Income Tax as well as the order of the learned Income Tax Appellate Tribunal.

7. Whether it was an income, taxable or not or whether it was an expenditure, to be capitalised or not, are entirely two different fields and therefore, both the authorities appear to have proceeded on a wholly wrong premise or under a confusion in the matter. It appears that these orders have been passed in a casual manner without proper enquiry into the facts by both the fact finding authorities. Therefore, in our opinion, the matter

deserves to be remanded back to the learned Commissioner of Income Tax for passing fresh orders, in accordance with law, under Section 263 of the Act, after giving a reasonable and adequate opportunity of hearing to the Assessee.

8. Accordingly, the present Appeal of the Revenue is allowed without answering the question of law raised in the matter by setting aside the order of the learned Income Tax Appellate Tribunal dated 28.09.2012 and the order of the learned Commissioner of Income Tax under Section 263 of the Act dated 23.09.2012 for the Assessment Year 2007-2008 and the matter is restored on the file of the learned Commissioner of Income Tax - I, Coimbatore, for deciding the proceedings under Section 263 of the Act afresh, after giving an opportunity of hearing to the Assessee, in accordance with law. In view of the long lapse of time, the Assessee may appear before the learned Commissioner without any separate notice in this regard. in the first instance, on 05.11.2020 and thereafter, the proceedings shall be concluded within a period of three months.

9. With these observations and directions, the Appeal is disposed of. No costs.

Sd/-

Assistant Registrar

//True Copy//

Sub Assistant Registrar

nv

To

1.Income Tax Appellate Tribunal,
Madras 'B' Bench.

2.The Commissioner of Income Tax-1,
Coimbatore.

3.The Assistant Commissioner of Income - Tax,
Company Circle-1(1),
Coimbatore.

+1 cc to M/s.P.J.Rishikesh, Advocate Sr.No. 34351

+1 cc to M/s.M.Swaminathan, Advocate Sr.No. 34641

T.C.A. No. 411 of 2013

LN (CO)

RMP (23/10/2020)