In the High Court of Judicature at Madras

Dated : 15.6.2020

Coram :

The Honourable Mr.Justice T.S.SIVAGNANAM

and

The Honourable Mrs.Justice PUSHPA SATHYANARAYANA

Tax Case Appeal No.528 of 2013

The Commissioner of Income
Tax, Coimbatore ...Appellant/Respondent

Vs

M/s.Indo Shell Mould Ltd.,
A9, SIDCO Industrial Estate, Kurichi,
Coimbatore-18. ...Respondent/Appellant

APPEAL under Section 260A of the Income Tax Act, 1961 against the order dated 13.9.2011 made in ITA.No.981/Mds/2011 on the file of the Income Tax Appellate Tribunal, Chennai 'C' Bench for the assessment year 2006-07. ITA.No.981/mds/2011 against the Commissioner of Income Tax-I, Coimbatore, in C.No.120(11)/CIT-I/CBE/2010-11 order dt 25/03/2011 for the Assessment year 2006-2007 against the Assistant Commissioner of Income Tax, Company Circle I(1), Coimbatore, order dated 31/10/2008 in PAN NO/GIR.NO-AAACI4300C for the assessment year 2006-2007.

For Appellant : Mr.T.R.Senthilkumar, SSC & Ms.K.G.Usharani, SC
For Respondent: Mr.A.S.Sriraman

Judgment was delivered by T.S.Sivagnanam,J

We have heard Mr.T.R.Senthilkumar, learned Senior Standing Counsel and Ms.K.G.Usharani, learned Standing Counsel appearing for the appellant - Revenue and Mr.A.S.Sriraman, learned counsel appearing for the respondent.

2. This appeal, filed by the Revenue under Section 260A of the Income Tax Act, 1961 (for short, the Act) is directed against the order dated 13.9.2011 made in ITA.No.981/Mds/2011 on the file of the Income Tax Appellate Tribunal, Chennai 'C' Bench (for brevity, the Tribunal) for the assessment year 2006-07.

3. The appeal has been admitted on 20.12.2013 on the following substantial questions of law :

> "i. Whether, under the facts and circumstances of the case, the Income Tax Appellate Tribunal was right in not upholding the order of the Commissioner of Income Tax setting aside the assessment made by the Assessing Officer and directing the Assessing Officer to examine the aspect that the assessee did not exercise option to claim depreciation at the rate of 80% under Appendix I before the due date for filing of the return while making fresh assessment ?
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> ii. Whether, under the facts and circumstances of the case, the Income Tax Appellate Tribunal was right in holding that the assessee has satisfied the requirement of Second Proviso to Rule 5(1A) of the Income Tax Rules and they are entitled for depreciation on windmills as per Appendix I is valid ?
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> iii. Whether, under the facts and circumstances of the case, the Income Tax Appellate Tribunal was right in law in granting depreciation at 80% on windmills even though the Proviso to Section 32(1)(i) and Rule 5(1A) clearly stipulate that only rate of depreciation on the method as provided for in Appendix IA will be relevant for power generating machinery ?
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> iv. Whether, under the facts and circumstances of the case, the Income Tax Appellate Tribunal was right in law in granting depreciation at 80% on windmills even though the assessee is entitled at the rate of 7.69% of the cost and this rate has correctly been allowed by the Assessing Officer ? And
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> v. Whether, under the facts and circumstances of the case, the Income Tax Appellate Tribunal was right in law in holding that the assessee is entitled for higher rate of depreciation even though the assessee had filed return of income within the due date and has also not exercised its option separately?"

4. The substantial questions of law framed for consideration have to be answered in favour of the assessee in the light of the decision of the Hon'ble Division Bench of this Court in the

case of CIT Vs. Kikani Exports (P) Ltd. [reported in (2015) 369 ITR 500] wherein an identical question was considered and the appeal filed by the Revenue was dismissed. The relevant portions of the said judgment read thus :

> "16. Short of repetition, the issue that arise for consideration is for the purpose of claiming depreciation, whether the assessee should exercise an option before the due date in the manner other than by filing return of income in terms of sub-section (1) of Section 139 of the Income Tax Act. According to the Revenue, each one of the assessee should file a separate application or a letter indicating their intention to avail depreciation in terms of Section 32 read with Rule 5(1) of the Income Tax Rules and since the assessee in each case has not exercised such an option before the due date for furnishing the return of income, they will not be entitled to the benefit of Rule 5(1) Appendix I, but depreciation only under Rule 5(1A) Appendix 1A.
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> 17. It is relevant to note that while filing the return of income, a procedure has been prescribed for claiming depreciation as pointed out above. The assessee has to set out the manner in which depreciation is claimed for the assessment years in question. All the details required for claiming depreciation under various heads are set out thereunder. Rule 5 of the Income Tax Rules is in relation to determination of profits and gains of business or profession and depreciation forms part of such determination. Therefore, there cannot be an option exercised in isolation (i.e.,) depreciation with regard to determination of profits and gains of business or profession in the manner other than the procedure prescribed under Section 139(1) of the Income Tax Act. The assessee is liable to file the return of income and claim depreciation in accordance with the various provisions and state in exactitude what he claims under different heads of depreciation. Schedules DOA and DEP in Form ITR - 6 contain the break up of various heads under which depreciation can be claimed. All that the second proviso to Rule

5(1A) of the Income Tax Rules states is that the assessee has to exercise the option before the due date for furnishing the return of income. In otherwords, if the option is exercised after furnishing of the return of income under sub-section (1) of Section 139, it is of no avail. This assumes importance, as no procedure is prescribed for exercising the option. Form ITR- 6 gives the methodology on which depreciation can be claimed and therefore, the statue did not provide for any other method to exercise the option except through filing of return. Therefore, to read something more into the second proviso to Rule 5(1A), that an option should be exercised separately would make the returns filed meaningless.

18. Our view as above is fortified by the reasoning in the decision (CIT v. Vijaya Hirasa Kalamkar (HUF) [1998] 229 ITR 772 the Bombay High Court while dealing with the word "before", held as follows:

'Having regard to the object of the Ordinance and the words used in section 3 (1), it seems to us that the declaration received on January 1,1976, was well within time. In the whole context, the word "before" will have to be construed as "up to" or as "not after". There are various pro-visions in the Income-tax Act, wherein the expression "before" has been used (sections 139(1)(a)(i), section 139(1)(b) ; section 184 ; section 212). The expression has always been taken to mean "up to". Section 3 specified the period before which a declaration in respect of income has to be made for the purposes of getting a benefit under the Ordinance. It provides a period of limitation within which certain benefits are available. In case of ambiguity the construction which preserves the right to the one which defeats it, has to be preferred. After all, this is a taxing statute which in case of doubt should be interpreted in favour of a taxpayer. Had the legis-lative intention been to make December 31, 1975, the last day for making the declaration, it could have clearly said so in the proviso. The very fact that the date

January 1, 1976, is in terms mentioned indicates that the time limit was up to that date. That in a given case the word "before"in the context of the time can be construed as "not after" is well settled.(R v. Arkwright, [1848] 12 QB 960). This court in the case of PremchandNathmal Kothari v. Kisanlal Bachharaj Vyas, AIR 1976 Bom 82, had read the word "before" in section 3 of the Maharashtra (Vidarbha Region) Agricultural Debtors' Relief Act, 1969, as "up to'.

19. The Tribunal in the case of K.K.S.K. Leather Processors (P.) Ltd. (supra) following the decision of the Bombay High Court reported in Vijaya Hirasa Kalamkar (HUF) (Supra) held as follows:

"From the above mentioned decisions, it is clear that the word 'before' would have to be construed as upto or not after. The Hon'ble Bombay High Court has specifically referred to provisions of Section 139 of the Act while explaining the expression of the word 'before'. Therefore, we hold that the option exercised by the assessee on due date by way of making claims of depreciation in the return of income along with audit report and books of account wherein the assessee has adopted the rate as claimed is within time limit prescribed under second proviso to Rule 5(1A) of Income-tax Rules. Even otherwise as held by the Bombay High Court in the case of CIT vs. Shivanand Electronics (supra) the provision can be understood with reference to the intent of legislature and not upon the language in which the intent is clothed. If the object of enactment will be defeated by holding it as directory it should be construed as mandatory. Whereas if by holding it mandatory, serious general inconvenience will be created to innocent persons without very much furthering the object of the enactment, it should be construed as directory. The limit provided under the second proviso to Rule 5(1A) is only to facilitate the Assessing Officer in discharging its obligations and duties as per the provisions of sub-section (1) of section 32 of the Income-tax Act. Therefore the said requirement cannot be considered as mandatory. Moreover the Assessing Officer cannot act on the option exercised before the return is filed and therefore no fruitful purpose or object can be achieved by mandating exercise of option prior to filing of return on due date."

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 make a provision for exercising an option in respect of the claim of 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.

22. In so far as T.C.(A)No.509 of 2013 is concerned, as contended by the learned counsel appearing for the assessee, on the quantum appeal, the Commissioner of Income Tax (Appeals) as well as the Tribunal held in favour of the assessee and there is no appeal on that issue before this Court. Therefore, the question of law raised in this appeal becomes academic, in any event, not required to be answered.

23. In T.C.(A)Nos.1012, 1014 of 2010 and 272 of 2014, the assessee therein filed the return of income belatedly for the subsequent years and claimed the benefit of depreciation. The assessee in these cases filed return of income for the previous assessment year claiming depreciation within the time in accordance with Section 32(1) of the Income Tax Act and the Rules and that will enure to the benefit of the assessee for the subsequent years in view of the third proviso to Rule 5(1A) of the Income

Tax Rules, which reads as follows:

"5. Depreciation(1) Subject to the provisions of sub-rule (2), the allowance under clause (ii) of subsection (I) of section 32 in respect of depreciation of any block of assets shall be calculated at the percentages specified in the second column of the Table in Appendix I to these rules on the written down value of such block of assets as are used for the purposes of the business or profession of the assessee at any time during the previous year.

Provided also that any such option once exercised shall be final and shall apply to all the subsequent assessment years."

24. As the third proviso clearly states that the option once exercised will continue to all the subsequent years, the assessee is not required to exercise such option each and every year separately.

25. In view of the foregoing discussions, we pass the following order:

We answer the substantial question of law in favour of the assessee and against the Revenue. Consequently, the order of the Tribunal stands confirmed.

In the result, all the above Tax Case (Appeals) are dismissed."

5. Following the said decision, the above tax case appeal filed by the Revenue is dismissed and the substantial questions of law framed are answered in favour of the assessee. No costs.

Sd/-

Assistant Registrar

//True Copy//

Sub Assistant Registrar

To

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

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

3. The Assistant Commissioner Of Income Tax,
Company Circle I(1), Coimbatore.

TCA.No.528 of 2013

RJI (CO)
RV (08/09/2020)