IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 13.10.2020

CORAM

THE HONOURABLE MR.JUSTICE T.S.SIVAGNANAM
and
THE HONOURABLE MRS.JUSTICE V.BHAVANI SUBBAROYAN

T.C.A.No.190 of 2018
and
C.M.P.No.3204 of 2018

M/s.Carborundum Universal Ltd.,
Parry House,
No.43, Moore Street,
Chennai - 600 001
PAN: AAACC2474P .. Appellant/Appellant

Versus

The Assistant Commissioner of Incometax,
Large Tax Payer Unit - 1,
1775, Jawaharlal Nehru Inner Ring Road,
Anna Nagar Western Extension
Chennai - 600 101 .. Respondent/Respondent

Prayer:- Tax Case Appeal filed under Section 260-A of the Income Tax Act, 1961, against the order of the Income Tax Appellate Tribunal, Madras 'D' Bench, dated 19.05.2016 made in I.T.A.No.1736/Mds/2014 relating to the Assessment Year 2004-05.

Appeal against the Order dated 20/03/2014 on the file of the Commissioner of Income Tax (Appeal) Large Tax Payer Unit, Chennai made in ITA No. 57/09-10 LTU (A)/ PAN No.AAACC2474P, Assessment Year 2004-05.

Appeal against the Order dated 17/12/2009 on the file of the Additional commissioner of Income Tax LTU, Chennai, above said and PAN No. AAACC2474P for the Assessment Year 2004-05.

For Appellant : Mr.Venkatanarayanan
For M/s.Subbaraya Aiyar Padmanaban

For Respondent : Mr.T.Ravikumar
Senior Standing counsel

JUDGMENT

[Order of the Court was made by T.S.SIVAGNANAM, J.]

This appeal has been filed by the assessee under Section 260 A of the Income Tax Act, 1961 ('the Act' for brevity), challenging the order dated 19.05.2016 passed by the Income Tax Appellate Tribunal, Madras, 'D' Bench ('the Tribunal' for brevity) in I.T.A.No.1742/Mds/2014 for the Assessment Year 2004-05.

2. The assessee has re-framed the following Substantial Questions of Law as follows:

> "1. Whether the Tribunal was right in law in holding that the Provision made by the Assessee towards demand raised by Kerala State Electricity Board towards alleged theft of power, (Which was subsequently set aside by the Kerala High Court) is not an allowable expenditure in terms of Explanation to Section 37(1) of the IT Act?
>
> 2. Whether the claim for provision for demand raised by KSEB is disallowable under Explanation to Section 37 when the Kerala High Court has dismissed the case of KSEB and has held that there was no theft of power?
>
> 3. Whether the Tribunal was right in law in holding that the Assessee is not entitled for deduction u/s.37(1) of the Act in respect of provision towards a crystallized liability?
>
> 4. Whether, on the facts and in the circumstances of the case, The Tribunal was right in law in not following the decision in Exide Industries Ltd and another Vs. Union of India & Others 292 ITR 470."

3. We have heard Mr.Venkatanarayanan, learned counsel for the appellant/assessee and Mr.T.Ravikumar, learned Senior Standing counsel for the respondent/Revenue.

4. So far as the Substantial Question of Law No.4 is concerned, the same has to be answered against the assessee in the light of the decision of the Hon'ble Supreme Court of India in the case of Union of India and others Vs. Exide Industries Ltd and another, [(2020) 107 CCH 0427 ISCC]. Accordingly, the same is answered against the assessee. With regard to the re-framed Substantial Question of Law Nos.1 to 3, we find that no

material was placed by the assessee before the Tribunal to show that the assessee had succeeded in the Writ Petition filed by them before the High Court of Kerala, wherein according to the assessee, there is an observation that it is not theft of energy, but a case of excess consumption.

5. The learned counsel for the assessee submitted that though the assessee succeeded before the learned Single Judge, the Electricity Board filed Writ Appeal before the Hon'ble Division Bench, which was dismissed only in the year 2011. Though such submission is made before us, there is no scrap of paper placed before this Court either as an averment in the Memorandum of Grounds of appeal or a document in the typed set of papers. There is no mention about any order passed by the High Court of Kerala in favour of the assessee in the Memorandum of Grounds of appeal. However, we do not wish to place the assessee in a disadvantageous position, because no person should be put to prejudice on account of a Court order.

6. Therefore, this Court is inclined to grant liberty to the assessee to move the Tribunal by way of Miscellaneous Petition, raising all contentions and if such Miscellaneous Petition is filed, the Tribunal shall entertain the same without reference to limitation.

7. In the result, the Tax Case Appeal stands disposed of and the re-framed Substantial Question of Law Nos.1 to 3 are left open and the assessee is granted liberty to file a Miscellaneous Petition before the Tribunal. The Judgment of the High Court of Kerala, which according to the assessee is may be placed before the Tribunal in their favour. If such a Miscellaneous Petition is filed, the Tribunal shall entertain the same without reference to limitation and pass orders on merits and in accordance with law as observed earlier.

8. Substantial Question of Law No.4 is answered against the assessee in the light of the decision in the case of Union of India and others Vs. Exide Industries Ltd and another, [(2020) 107 CCH 0427 ISCC]

9. Mr.T.Ravikumar, learned Senior Standing counsel appearing for the respondent raised an apprehension that this order may be cited as a precedent for the assessee to raise fresh grounds before this Court for the first time in an appeal under Section 260A, which they have failed to raise before the Tribunal or the Commissioner of Income Tax (Appeals).

10. We agree with the submission of Mr.T.Ravikumar, learned Senior Standing counsel, that it will be impermissible for an assessee or for that matter the Revenue to raise a fresh

ground without raising the same before the lower Forum and in the absence of foundational facts. However, we have granted such liberty in the instant case because the learned counsel for the assessee stated before us that the assessee succeeded before the High Court of Kerala and there is no theft of energy recorded against the assessee. Therefore, this liberty can never be treated as a precedent for any other case. No costs. Consequently, connected miscellaneous petition is closed.

Sd/-

Assistant Registrar

//True Copy//

Sub Assistant Registrar

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To

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

2.The Commissioner of Income Tax (Appeals),
Large Tax Payer Unit, Chennai.

3.The Additional Commissioner of Income Tax,
LTU, Chennai.

+1cc to Mr.T.Ravikumar, Advocate, S.R.No. 34006

T.C.A.No.190 of 2018

PP(CO)
GN(22/12/2020)