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.522 of 2018
and
C.M.P.No.10644 of 2018

M/s.Chennai Petroleum Corporation Limited
536, Anna Salai, Teynampet,
Chennai - 600 018
PAN:AAACM4392C ..Appellant

Versus

The Deputy Commissioner of Income Tax,
Large Tax Payer Unit,
Chennai - 600 101 ..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 'B' Bench, dated 05.12.2017 made in I.T.A.No.1980/Mds/2011 relating to the Assessment Year 2004-05 against the order passed by this court dated 9/7/2013 made in TC (A) No.358/2010 and against the appellate order and grounds of Decision passed by the Commissioner of Income Tax(A) Large Tax payer Unit II floor 1775, Jawaharlal Nehru Inner Ring Road, Anna Nagar Western Extension, Chennai 600 101 dated 14/9/2011 in ITA No.795/2006-2007/LTU(A) for the Assessment year 2004-2005 and against the Assessment order passed by the Assistant commissioner of Income Tax, company Circle I(3) Chennai-34, dated 26/12/2006 made in GI No/PAN AAA CM 4392C/CX 2007 for the Assessment year 2004-2005.

For Appellant : Mr.R.Vijayaraghavan
for Mrs.Subburaya Aiyar Padmanabhan

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 05.12.2017 passed by the Income Tax Appellate Tribunal, Madras, 'B' Bench ('the Tribunal' for brevity) in I.T.A.No.1980/Mds/2011 for the Assessment Year 2004-05. The following Substantial Questions of Law are framed for consideration:

> "1. Whether the Tribunal was right in law in holding that the expenditure incurred towards revamping of vis-breaker unit which was abandoned is not an allowable deduction under Section 37 of the Act?
>
> 2. Whether the Tribunal should have directed the grant of depreciation on the repair charges incurred on Vis Breaker.
>
> 3. Whether the Tribunal was right in law in disagreeing with the Order of the Third Member of the Tribunal in the Assessee's own case for AY 1998-99 in ITA No.1822/Mds/2006 dated 23.10.2009 & Hon'ble Madras High Court decision in asseesse's own case for AY 1998-99 in TCA 358 of 2010 regarding the claim of depreciation on gas sweetening plant?"

2. We have heard Mr.R.Vijayaraghavan, learned counsel for the appellant / assessee and Mr.T.Ravikumar, learned Senior Standing counsel appearing for the respondent / Revenue.

3. So far as the Substantial Question of Law No.3 is concerned, the same issue was considered as the assessee's own case for the Assessment Year 1998-99 in T.C.A.No.358 of 2010. The issue was decided in favour of the assessee. The Substantial Questions of Law framed for consideration in the said case was also identical to that of Question No.3 herein pertaining to the claim for depreciation on gas sweetening plant. The operative portion of the judgment reads as follows:

> "18. We are in entire agreement with the view expressed by the Bombay High Court in the decision reported in (1971) 79 ITR 613 (Whittle Anderson Ltd Vs. Commissioner of Income Tax, Bombay City I.) following the decision reported in (1937) 5 ITR 626 (Bhikaji Venkatesh Vs. Commissioner of Income-tax) in the light of the decision of this Court reported in 128 ITR 675 (CIT Vs. Vayithiri Plantations Ltd).
>
> 19. Even though learned Standing counsel appearing for the Revenue contended that such decision related to the case of development under Section 33 of the Income

Tax Act, yet, this Court referred to the decision under Section 32 of the Income Tax Act in the context of the expression 'used for the purpose of business' as explained in (1954) 25 ITR 265 (Liquidators of Pursa Ltd Vs CIT) and held that so long as the business was going and the machinery got ready for use but due to certain extraneous circumstances, the machinery could not be put to use, the said fact could not stand in the way of granting relief under Section 32 of the Act.

20. As far as the decision of this Court reported in 260 ITR 655 (CIT Vs. Maps Tours and Travels) is concerned, if under law, there is a prohibition on the assessee to put the cars on roads for want of registration, considering such prohibition, the claim of the assessee under Section 32 of the Income Tax Act could not be granted. Thus the above said decision has to be seen in the light of the facts and circumstances of the case; hence, the same would not be of any assistance to the assessee. In fact, learned Standing counsel appearing for the Revenue fairly stated before this Court that in the decisions reported in (2009) 311 ITR 202 (Commissioner of Income Tax Vs. Southern Petrochemical Industries Corporation Ltd.,) and (2008) 301 ITR 255 (Commissioner of Income Tax Vs. Southern Petrochemical Industries Corporation Ltd.,), this Court had considered the grant of depreciation even to stand-by machinery. When that being the case, we do not find any justifiable ground to disturb the reasoning of the majority members of the Income Tax Appellate Tribunal.

21. Under the stated circumstances, on the admitted case that business was a going concern and the machinery could not be put to use due to raw material paucity, we reject the Revenue's contention, thereby, confirm the majority view of the Income Tax Appellate Tribunal.”

4. Accordingly, the Substantial Question of Law No.3 is decided in favour of the assessee by following the aforementioned decision. So far as the Substantial Question of Law No.1 is concerned, we have noted the findings recorded by the Tribunal. We have perused the findings recorded by the Tribunal and find that the Tribunal rightly reverse the order passed by the Commissioner of Income Tax ['CIT(A)' for brevity] on this aspect. The Tribunal took note of the decision of the Hon'ble Supreme Court of India and arrived a finding against the assessee, We find no grounds to interfere with the said finding. Accordingly, the Substantial Question of law No.1 is answered against the assessee. With regard to Substantial Question of law No.2 is concerned, having held that the deduction is not allowable under Section 37 of the Act with regard to the expenditure incurred for revamping of vis-breaker Unit. The

Tribunal ought to have considered the claim for consideration at vis-breaker Unit. Though there is a reference made to the said submission of the assessee, We find that there is no specific finding rendered by the Tribunal on that record. That apart, We find that such a claim for depreciation was not made by the assessee before the Assessing Officer or before the CIT(A) as an alternate submission and it was raised only before the Tribunal. Therefore, We are inclined to grant liberty to the assessee to raise that issue before the Assessing Officer which can be considered in accordance with law.

5. In the light of the above decision, the Tax Case Appeal is partly allowed. Substantial Question of Law No.1 is answered against the assessee. Substantial Question of Law No.2 is remanded to the Assessing Officer for the limited purpose of considering the claim for grant of depreciation on repair charges incurred on vis-breaker unit and Substantial Question of Law No.3 is answered in favour of the assessee, following the judgment of the Hon'ble Division Bench in the assessee's own case in T.C.A.No.358 of 2010 dated 09.07.2013. No costs. Consequently, connected miscellaneous petition is closed.

Sd/-

Assistant Registrar

//True Copy//

Sub Assistant Registrar

To

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

2. The Commissioner of Income Tax(a)
   Large Tax Payer Unit, II floor,
   1775, Jawaharlal Nehru Inner ring Road,
   Anna Nagar, Western Extension, Chennai-101.

3. The Assistant Commissioner of Income Tax,
   Company circle I(3), Chennai-34.

+1cc to Mr.T.Ravikumar, Advocate, S.R.No.34008

T.C.A.No.522 of 2018

EV(CO)
RV(06/11/2020)