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ORDER SHEET
IN THE HIGH COURT AT CALCUTTA
Constitutional Writ Jurisdiction
ORIGINAL SIDE
WPO 156 OF 2021

EMAS EXPRESSWAY PVT. LTD.
Versus
ASSISTANT COMMISSIONER OF INCOME TAX CIRCLE 8(1) KOLKATA AND ORS.

BEFORE:
The Hon'ble JUSTICE SHEKHAR B. SARAF
Date : 12TH April, 2021.

Appearance :
Mr. Ratnanko Banerjee, Sr. Adv.
Mr. Asim Choudhury, Adv.
Ms. Aesa Dey, Adv.
...For the Petitioner

Mr. Dhiraj Kumar Trivedi, Adv.
Mr. M. N. Bandopadhyay, Adv.
...For the Respondents

The Court : This is an application under Section 226 of the Constitution of India wherein the writ petitioner is aggrieved by an order dated March 4, 2021 passed by the Assistant Commissioner of Income Tax, Circle 7(1), Kolkata disposing of the objections filed by the assessee with regard to reopening of assessment under Sections 147 to 150 of the Income Tax in relation to assessment year 2015-16.

The main reason for reopening of the assessment is that the assessee has erroneously applied CBDT Circular No.09/2014 dated 23/04/2014 and claimed amortization expenses for the financial year 2014-15. According to the Income Tax Department, this Circular is not applicable to the assessee as the assessee is

a BOT (Build –Operate- Transfer), who receives amenity while the circular applies only to BOT operators who are collecting toll.

Mr. Banerjee, assisted by Mr. Asim Choudhury, has placed this circular and relied specifically on paragraphs 4 and 5 of the said circular.

Paragraphs 4 and 5 are delineated below :-

“4. There is no doubt that where the assessee incurs expenditure on a project for development of roads/highways, he is entitled to recover cost incurred by him towards development of such facility (comprising of construction cost and other pre-operative expenses) during the construction period. Further, expenditure incurred by the assessee on such BOT projects brings to it an enduring benefit in the form of right to collect the toll during the period of the agreement. Hon’ble Supreme Court in the case of Madras Industrial Investment Corporation Ltd. Vs. CIT in 225 ITR 802 allowed spreading over of liability over a number of years on the ground that there was continuing benefit to the company over a period. Therefore, analogously, expenditure incurred on an infrastructure project for development of roads/highways under BOT agreement may be treated as having been made/incurred for the purposes of business or profession of the assessee and same may be allowed to be spread during the tenure of concessionaire agreement.

5. In view of above, Central Board of Direct Taxes, in exercise of the powers conferred under section 119 of the Act hereby clarified that the cost of construction on development of

infrastructure facilities of roads/highways under BOT projects may be amortized and claimed as allowable business expenditure under the Act.”

Mr. Banerjee further submitted that since the assessee was entitled to deduction under Section 80IA of the Income Tax Act, 1961, there was no question of any escapement of tax as increase in income by not claiming amortization would not result in the assessee paying any further tax as the same was 100% deductible under Section 80IA.

Mr. Trivedi, learned Advocate appearing on behalf of the respondent relies on first paragraph of the circular and submits that the circular is not applicable to the assessee. The first paragraph is delineated below :

“It has come to the notice of the Board that disputes have arisen as to whether the expenditure incurred on development and construction of infrastructural facilities like roads/highways on Build-Operate-Transfer (‘BOT’) basis with right to collect toll is entitled for depreciation under section 32(1)(ii) of the Act or the same can be amortized by treating it as an allowable business expenditure under the relevant provisions of the Income-Tax Act, 1961 (‘Act’).”

Mr. Trivedi, learned Senior Counsel submits that since this infrastructure facilities run by the assessee does not have any right for collecting toll, this circular is not applicable to the assessee.

Mr. Trivedi, Learned Senior Counsel further relies on the impugned order and submits that all the objections of the petitioner have been taken care of.

Upon perusal of the document, I find that the impugned order does not address the issue in relation to the tax neutrality because of the fact that the assessee was eligible for deduction under Section 80IA. All other issues raised by the petitioner have been dealt with. Whether the same have been dealt with correctly or not, has not been gone into by me in this writ petition.

In my view, the Commissioner of Income Tax should have looked into the fact as to whether there could not be an escapement of tax because of the fact of the deduction available to the petitioner under Section 80IA. It is to be noted that this was the last year of deduction that was available to the petitioner out of the ten consecutive years that is available. As the reassessment proceeding is based on the fact that there was an escapement of tax, this issue was required to be answered and taken care of by the Commissioner of Income Tax. This not having been done, the impugned order is quashed and set aside with a direction upon the Officer to pass a further reasoned order after granting an opportunity of hearing to the petitioner.

The Commissioner of Income Tax is specifically directed to deal with all points including the point in relation to escapement of tax because of deduction available to the petitioner under Section 80 IA of the Act.

The writ petition being WPO No.156 of 2021 is disposed of accordingly.

Since no affidavits have been filed in this matter, the allegations made in the writ petition are deemed not to have been admitted by the respondent.

Urgent xerox certified copy of this order, if applied for, be given to the parties upon compliance of all formalities.

(SHEKHAR B. SARAF, J.)