OD-38

ITAT/186/2017
IA NO: GA/1/2018 (Old No: GA/2157/2018)
IN THE HIGH COURT AT CALCUTTA
SPECIAL JURISDICTION(INCOME TAX)
ORIGINAL SIDE

VESUVIUS INDIA LIMITED
VERSUS
ASSISTANT COMMISSIONER OF INCOME TAX

BEFORE :
THE HON'BLE JUSTICE T.S. SIVAGNANAM
And
THE HON'BLE JUSTICE HIRANMAY BHATTACHARYYA
Date : 25th November, 2021

Appearance:-

Mr. J.P. Khaitan, Sr. Adv.
Mr. Somak Basu, Adv.
...For Appellant

Mr. P. K. Bhowmik, Adv.
... For Respondent

The Court : This appeal filed by the revenue filed under Section 260A of the Income Tax Act, 1961 (the `Act' for brevity) is directed against the order dated 28th December, 2016 passed by the Income Tax Appellate Tribunal, "C" Bench, Kolkata (the `Tribunal') in ITA No. 614/Kol/2011 for the assessment year 2004-05.

The assessee has raised the following substantial questions of law for consideration:-

a) Whether on the facts and in the circumstances of the case and in law, the Tribunal erred in denying the claim of the appellant that profits and gains of business of the undertaking eligible for deduction under Section 80-IB shall be re-computed by considering only the income and expenditure having direct and immediate nexus to the said undertaking ?

b) Whether on the facts and in the circumstances of the case and in law and without prejudice to 7(a), the Tribunal erred in denying the claim of the appellant that profit and gains of business of the undertaking eligible for deduction under Section 80-IB shall be re-computed by excluding net of other income instead of gross of other income ?

c) Whether on the facts and in the circumstances of the case and in law the Tribunal erred in law in remanding back the matter to the Assessing officer for re-examination in allowing the claim of petitioner on account of interest from the other of Rs.38,27,000/- relates to interest on late payment received from trade debtors and miscellaneous income of Rs.10,86,000/- has been generated from sale of scrap in computing profits and gains of business of eligible undertaking under Section 80IB, when Appellate and Assessing authority both have been fully satisfied about the nature of the said incomes ?

We have heard Mr. J.P. Khaitan, learned Senior Counsel assisted by Mr. Somak Basu, learned Counsel appearing for the respondent/assessee and Mr. P.K. Bhowmik, learned Counsel appearing for the appellant.

Learned Counsel appearing for the appellant assessee submitted that a substantial question of law being ground (c) is not pressed. Thus it leaves us with substantial questions of law (a) and (b) to be decided. The order impugned before us passed by the Tribunal is for assessment years 2003-04 and 2004-05 and the Tribunal disposed of both the appeals by a common order dated 28th December, 2016. As against the order passed for the assessment year 2003-04, the appellant/assessee had filed appeal before this Court being appeal ITAT 188 of 2017 and by judgment dated 24th November, 2021 we have allowed the appeal filed by the assessee in part and remanded the matter to the assessing officer for fresh consideration. In the impugned order, in paragraph 5 the Tribunal has noted the grounds raised by the assessee before it. However, there appears to be a small error in not noting the grounds raised by the assessee for the assessment year 2004-05. Though the grounds were identical, the figures mentioned therein differ. For easy reference, we note the said grounds as under :-

> "2(a) That on the facts and in the circumstances of the case, the Ld.CIT(Appeals) was not justified rather grossly erred in excluding other income comprising of commission of Rs.25,000/-, interest from bank of Rs.5,36,000/-, interest from others of Rs.38,27,000/0 and scrap sales of Rs.10,86,000/- in computing profits and gains of business of the undertaking eligible for deduction u/s80IB.

2(b) That on the facts and in the circumstances of the case, the Ld.CIT (Appeals) erred in facts and law in denying the claim of the appellant to exclude net of the aforesaid other income and not gross of the aforesaid income from the profits and gains of business of the eligible undertaking.

2(c) That on the facts and in the circumstances of the case and without prejudice to Ground No.2(a) and 2(b) taken here-in-above, the Ld. CIT (Appeals) erred in not re-computing profits and gains of business of the undertaking eligible for deduction u/s 80IB by considering only the income and expenditure attributable to the said undertaking."

Except for the above distinction namely, the figures which have been mentioned above for the assessment year 2004-05, in all other aspects the matter is identical to that of the decision for the assessment year 2003-04.

We have elaborately heard Mr. Khaitan, learned senior counsel appearing for the appellant and Mr. Bhowmick, learned senior standing counsel appearing for the respondent/revenue. The Tribunal by impugned order dated 28th December, 2016 granted partial relief to the assessee but in so far as certain grounds, which were canvassed by the appellant/assessee the Tribunal did not take a decision in the matter but held those grounds to have become infructuous and they do not require any adjudication. The correctness of such order is being tested. To be noted that the Tribunal on the major issue, which was canvassed before it, on law held in favour of the assessee and for the purpose of computation the matter has been remanded back to the Assessing Officer. The submission of the learned counsel for the appellant assessee is that the other two grounds, which have been canvassed by the assessee would also form integral part of the main ground, which was canvassed before the Tribunal and the assessee never gave up those grounds of challenge. For consideration of the said submission of the learned counsel, we take note that the grounds, which were canvassed by the assessee before the Tribunal, which are quoted herein below:

> *" 2[a]. That on the facts and in the circumstances of the case, the Ld. CIT[Appeals] was not justified rather grossly erred in excluding other income comprising of commission of Rs.5,09,000/- interest from bank of Rs.8,72,000/-, interest from others of Rs.46,73,000/- and miscellaneous income of Rs.6,34,000/- in computing profits and gains of business of the undertaking eligible for deduction u/s. 80IB.*
>
> *2[b]. That on the facts and in the circumstances of the case, the Ld. CIT[Appeals] erred in facts and law in denying the claim of the appellant to exclude net of the aforesaid other income and not gross of the aforesaid income from the profits and gains of business of the eligible undertaking.*
>
> *2[c]. That on the facts and in the circumstances of the case and without prejudice to Ground No.2[a] and 2[b] taken here-in above, the Ld. CIT[Appeals] erred in not re-computing profits and gains of business of the undertaking eligible for deduction u/s 80IB by considering only the income and expenditure attributable to the said undertaking."*

As mentioned above, the ground no.2[a] [supra] has been decided in favour of the assessee in respect of the two items, namely, interest from others and sale of scrap. After having held that there is merit in the submission of the assessee as the proposition canvassed by them are supported with the judgments of the Hon'ble High Courts and the Hon'ble Supreme Court, the Tribunal remanded the matter to the Assessing Officer with a direction to examine the interest from others and miscellaneous income and the Assessing Officer was directed to give relief to the assessee in the light of the judicial pronouncements referred to in paragraph 6.4 of the order passed by the Tribunal. If such relief granted by the Tribunal to the assessee, we find no justifiable reason for having rejected the grounds 2(b) and 2(c) as having become infructuous. The Tribunal has not assigned any reason as to why and in what manner those two grounds have become infructuous. In any event, whether the claim made by the assessee to exclude net of the aforesaid other income and not gross of the aforesaid income from profits and gains of business of the eligible undertaking is also required to be considered by the Assessing Officer and this will form integral part of the computation directed to be done by the Tribunal by reminding the matter to the Assessing Officer. Furthermore, the assessee's specific case was that the Commissioner of Income Tax [Appeals] had committed an error in not re-computing the profits and gains of business of the undertaking eligible for deduction under section 80IB by considering only the income and expenditure attributable to the said undertaking. This ground also will form integral part of the ground no.2[a] of the grounds and the same is required to be considered by the Assessing Officer as to whether those grounds raised by the Assessing Officer are justifiable and legally tenable. Therefore, we are of the view that on remand while the Assessing Officer would comply with the direction issued by the Tribunal he shall also examine the grounds raised by the assessee, being ground no.2[b] and 2[c] [supra]. The assessee is at liberty to place all materials in support of their contention and thereafter the Assessing Officer shall redo the assessment in accordance with law.

With the above observation, the appeal stands partly allowed. Consequential substantial questions of law are left open.

Stay application, GA/2157/2018 stands disposed of accordingly.

(T.S. SIVAGNANAM, J.)

(HIRANMAY BHATTACHARYYA, J.)

SN./D.Ghosh
AR(CR)