

Form No.(J2)

IN THE HIGH COURT AT CALCUTTA
SPECIAL JURISDICTION (INCOME TAX)
ORIGINAL SIDE

Present :

THE HON'BLE JUSTICE T.S. SIVAGNANAM

A N D

THE HON'BLE JUSTICE HIRANMAY BHATTACHARYYA

IA NO.GA/2/2018
(Old GA/1615/2018)
ITAT/199/2018

PRINCIPAL COMMISSIONER OF INCOME TAX, CENTRAL-1, KOLKATA
-Versus-
M/S. SHALIMAR PELLET FEEDS LIMITED

*For the Appellant: Ms. Sucharita Biswas, Adv.
Mr. Soumen Bhattacharyya, Adv.*

*For the Respondent: Mr. J. P. Khaitan, Sr. Adv.
Mr. Siddhartha Das, Adv.
Ms. Swapna Das, Adv.*

Heard on : 07.12.2021

Judgment on : 07.12.2021

T. S. SIVAGANANAM, J. : This appeal of revenue filed under Section 260A of the Income Tax Act, 1961 (the 'Act' in brevity) is directed against the order dated 17th October, 2012 passed by the Income Tax Appellate Tribunal, Kolkata "C" Bench (the 'Tribunal'

in short) in ITA No.948 to 952/Kol/2017 for the assessment years 2008-09 to 2011-12 and 2013-14.

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

- "(a) *Whether in the facts and circumstances of the case, the Learned Tribunal was justified in quashing the order under Section 263 of the Income Tax Act, 1961 for the assessment years 2008-09 to 2011-12 by holding the assessment orders for these assessment years passed by the assessing officer as not erroneous and prejudicial to interest of revenue as the direction of Pr CIT for making additions on account of additional depreciation, suppression of sale and disallowance in case of depreciation was not based on incriminating material ignoring the fact that these additions were not made by the assessing officer in the assessment order and for making these additions, there is no requirement of incriminating material as per the provisions of Section 153A of the Income Tax Act, 1961 ?*
- (b) *Whether in the facts and circumstances of the case, the Learned Tribunal has erred in treating the seized material marked as SHLA-4 and SPG-2 as non-incriminating document and consequently after treating the order of assessing officer as non-erroneous, quashing the order under Section 263 of the Income Tax Act, 1961 for AY 2009-10 and nullifying the addition of Rs.3,24,49,403/- made by the assessing officer on the basis of order u/s 263 of the Act ?*
- (c) *Whether in the facts and circumstances of the case, the Learned Tribunal was justified in quashing the order under Section 263 of the Income Tax Act, 1961 for the assessment year 2013-14 by holding the assessment order passed for this assessment year is not*

erroneous and prejudicial to interest of revenue ignoring the fact that the addition on account of disallowance of the additional depreciation was not made by the assessing officer and by wrongly holding the assessee company as engaged in manufacturing activities?

- (d) Whether in the facts and on the circumstances of the case, the learned Tribunal was justified in arriving at finding by interpreting the term "Manufacture" occurring in the context of Section 80IB that does not necessarily require that the end product of the manufacturing process be completely different from the ingredients, as regard its chemical composition, integral structure or its use ?*
- (e) Whether in the facts and circumstances of the case, the learned Tribunal was justified in not appreciating that the process of manufacturing of poultry feeds does not amount to mere mixing together of all the different ingredients, without involving any change in the chemical composition of the ingredients ?*
- (f) Whether in the facts and circumstances of the case, the learned Tribunal was justified in not appreciating that the process of preparation of poultry feeds does not amount to production of an article within the meaning of Section 80IB of the Income Tax Act, 1961 and as such not eligible for deduction as claimed by the assessee ?*
- (g) Whether in the facts and circumstances of the case, the Learned Tribunal has erred in quashing the order under Section 263 of the Income Tax Act, 1961 for the assessment year 2009-10 without considering the merit of disallowance of depreciation claim @ 30 % on lorry which are not used for hiring business ?*
- (h) Whether in the facts and circumstances of the case, the Learned Tribunal has erred in quashing the order under Section 263 of the*

Income Tax Act, 1961 thereby deleting the addition made under Section 153A/143(3) of the Income Tax Act, 1961 in absence of incriminating documents without considering the Apex Court's admission of SLP in the case of CIT - II - Versus - Continental Warehousing Corporation Ltd. Reported in (2015) 64 Taxman.com (SC) where SLP was admitted against an order of High Court that no addition can be made without incriminating documents ?

- (i) *Whether in the facts and circumstances of the case, the Learned Tribunal has erred in not considering the fact regarding admission of SLP by Supreme Court in the case of CIT-Versus-RRJ Securities Ltd. Reported in 246 Taxman 62 (SC) where Section 153C read with Section 153A of the Income Tax Act, 1961 were initiated without incriminating documents ?"*

We have Ms. Sucharita Biswas, learned counsel assisted by Mr. Soumen Bhattacharyya, learned advocate for the appellant/revenue and Mr. J. P. Khaitan, learned senior counsel assisted by Mr. Siddhartha Das and Ms. Swapna Das, learned advocates for the respondent/assessee.

There are five assessment years involved in this appeal and the revenue has filed a single appeal challenging the common order passed by the tribunal. In so far as substantial question no.(a) is concerned, it arose for all the assessment years. Substantial question nos.(b) and (g) arose for the assessment year 2009-10; whereas substantial question nos.(c), (d), (e) and (f) arose for the assessment years 2008-09, 2010-11, 2011-12 and 2013-14. Substantial question nos.(h) and (i) are also common to all

the assessment years. So far as assessment years 2008-09, 2010-11, 2011-12 and 2013-14 are concerned, all the appeals filed by the revenue are below the threshold limit of the tax effect stipulated by the circular issued by the Central Board of Direct Taxes (CBDT). Therefore, the appeals with regard to the aforementioned four assessment years stand disposed of on the ground of low tax effect. Consequentially, the questions of law sought to be raised in those appeals for the relevant assessment years are left open.

In so far as the assessment year 2009-10 is concerned, the Commissioner of Income Tax, Central-I, Kolkata (CIT), while exercising his power under Section 263 of the Act, has stated that there are ample records and documents to indicate that the assessee company had made sales to M/s. Shalimar Hatcheries Limited as evident from the sales bill seized during the search operations forming part of the incriminating evidence. Further it has been stated that seized materials were available. The assessing officer ought to have made an enquiry regarding financial and business transactions of the assessee with M/s. Shalimar Hatcheries Limited. Further the CIT stated that from the trial balance it is seen that the assessee had disclosed lorries as assets and it is also evident from the balance sheet of the assessee for the year ending on 31st March, 2009 that depreciation

was claimed at the rate of 30% and this should also have prompted the assessing officer to make proper enquiries to ascertain the claim of depreciation at the rate of 30% on the lorries. In the opinion of the CIT the issues are clearly linked with the seized document and were required to be examined and verified by the assessing officer during the course of assessment proceeding under Section 143(3) read with Section 153A of the Act. Therefore, the CIT rejected the contention of the assessee that no incriminating evidence related to transactions (sales) with Shalimar Hatcheries Limited and disallowance of excess depreciation of lorries was found during the course of search assessment. CIT was of the opinion that such contention is not based upon facts and therefore not true. Thus, the contention of the assessee that there was no incriminating material related to the transactions with M/s. Shalimar Hatcheries Limited and disallowance of excess depreciation on lorries was rejected. Consequently, the CIT came to the conclusion that the order of the assessing officer was erroneous and prejudicial to the interest of revenue. The assessee carried the matter on appeal to the tribunal contending that before the CIT the assessee in their reply to the notice under Section 263 of the Act had brought to his notice that no incriminating materials were found in the course of search

regarding the aforesaid items and therefore, the conclusion of the CIT was erroneous.

With regards to the show cause notice for the assessment year for consideration, namely, assessment year 2009-10. The CIT had placed reliance on the seized documents marked as SHLA-4 from pages 2 to 105 and SPG-2 from pages 18 to 20 as incriminating documents found during the course of search. The assessee's contention was that the seized documents marked as SHLA-4 from pages 2 to 105 contains only sales bill relating to the sales made by the assessee to M/s. Shalimar Hatacharies Limited and such information is already part of regular books of account of the assessee and there is nothing incriminating therein. The assessee further contended before the tribunal that they had filed a detailed reconciliation statement before the CIT to substantiate the case that the same did not emanate from the seized material. The assessee also gave an explanation for the alleged difference which has been noted by the tribunal in paragraph-7.1 of the impugned order. Further the assessee contended that the seized documents in SPG-2 from pages 18 to 20 contains trial balance for the period from 1.4.2012 to 31.3.2013 which are part of the regular books of account of the assessee and there is nothing incriminating therein and in any case the seized documents pertain to the assessment year 2013-14 and cannot be termed as

incriminating for the assessment year 2009-10. Thus, the argument of the assessee was that the CIT has ignored all the explanations and submissions made by them and merely stated that the assessing officer has not made enquiry with regard to the seized documents and treated the order of the assessing officer as erroneous and prejudicial to the interest of revenue. The tribunal while examining the correctness of the stand taken by the assessee before it was required to examine the facts placed before it which the tribunal has noted in paragraph-7.1 of the impugned order. While deciding the controversy and rendering a finding, the tribunal in paragraph-9 held that the assessee has given an explanation which is acceptable and there was nothing to disturb the concluded assessment for the assessment year 2009-10. In our considered view such conclusion appears to be without sufficient reason. We say so because when the assessee's case was that the CIT had ignored the explanation and submission therefore, if the tribunal was of the view that the CIT did not consider the explanation, it would have been well justified to accept the explanation, submission and record a finding. The other option open would have been to send the matter back to CIT for re-examination of the explanation and submission of the assessee. Either of the two options had not been chosen by the tribunal but

merely concluded by stating that the explanation offered by the assessee is acceptable without assigning any reasons therefor.

Thus our considered view would be an incorrect manner of rendering a conclusion which revolves entirely on facts and documents which were placed by the assessee before the CIT. Therefore, we are of the view that such finding of the tribunal requires to be set aside and the matter has to be remanded back to the Commissioner of Income Tax for fresh consideration on the said aspect.

So far as the issue with regard to the claim for direction under Section 80IB is concerned, it is submitted by the Counsel on either side that such issue does not arise in the assessment year 2009-10. In the result the appeals in so far as the assessment years 2008-09, 2010-11, 2011-12 and 2013-14 are dismissed on the ground of low tax effect. Consequently, the substantial questions of law raised in this appeal in so far as the assessment years, as indicated above, are left open.

So far as the order of the tribunal pertaining to the assessment year 2009-10 on two issues, namely, sales bill and depreciation on lorries is set aside and the matter is remanded to the CIT for fresh consideration after giving an opportunity of hearing to the respondent assessee. Since we have remanded the matter for fresh consideration by the CIT, we give liberty to the

respondent assessee to raise all issues and more particularly the argument which has been placed before us that seized documents are not incriminating materials including the merits of the matter as well.

Consequently, the order passed by the CIT for the assessment year 2009-10 is also set aside and the matter is remanded to the CIT for fresh consideration.

The connected application for stay (IA No.GA/2/2018) also stands closed.

(T.S. SIVAGNANAM, J.)

I agree.

(HIRANMAY BHATTACHARYYA, J.)