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ITAT/233/2018
IA NO: GA/2/2018(Old No.GA/2095/2018)
IN THE HIGH COURT AT CALCUTTA
SPECIAL JURISDICTION (INCOME TAX)
ORIGINAL SIDE

PRINCIPAL COMMISSIONER OF INCOME TAX, KOLKATA-4
VERSUS
EVEREADY INDUSTRIES INDIA LIMITED

BEFORE :

THE HON'BLE JUSTICE T.S. SIVAGNANAM
And
THE HON'BLE JUSTICE HIRANMAY BHATTACHARYYA

Date : 30th November, 2021

Appearance :-

Mr. Smarajit Roychowdhury,
Mr. Ashok Bhowmick, Advs.
... For Appellant

Mr. Asim Choudhuri, Advs.
... For Respondent

The Court : This appeal by the revenue filed under Section 260A of the Income Tax Act, 1961 (the Act, for brevity) is directed against the order dated 18th October, 2017 passed by the Income Tax Appellate Tribunal, "A" Bench, Kolkata in ITA No.159/Kol/2016 for assessment year 2006-07. The revenue has framed the following questions of law for consideration :-

“(a) Whether on the facts and in the circumstances of the case the Learned Income Tax Appellate Tribunal, “A” Bench, Kolkata erred in law in upholding the order of CIT(A) in allowing fluctuation loss of Rs.534.58 lacs without having ascertained the purpose for loan ?

(b) Whether on the facts and in the circumstances of the case the Learned Income Tax Appellate Tribunal, “A” Bench, Kolkata erred in law in not considering the deeming provisions of Section 50 of the Income Tax Act, 1961, which starts with non obstante clause “Notwithstanding anything contained in Clause (42A) of Section 2” and, therefore, definition of capital asset under Section 50 of the Income Tax Act, 1961 itself contained ?

(c) Whether on the facts and in the circumstances of the case the Learned Income Tax Appellate Tribunal, “A” Bench, Kolkata erred in law in allowing spared over of upfront fees in absence of any enabling legal sanction under Income Tax Act, 1961?

We have heard Mr. Smarajit Roychowdhury, learned standing counsel appearing for the appellant and Mr. Asim Choudhuri, learned counsel appearing for the respondent assessee.

It is not in dispute that the substantial questions of law (a) and (c) have been answered against the appellant revenue in the respondent assessee’s own case being ITAT No. 96 of 2017 dated 29th November, 2021, which reads as follows :

“On going through the order passed by the tribunal, we find that the tribunal was considering six issues in all. The revenue has raised three substantial questions of law before us which are covered in the six issues which were before the tribunal. The first of the issues was whether the Commissioner of Income Tax (Appeals) (in short CIT(A)) was correct in deleting the disallowance made by the assessing officer under Section 43B of the Act on account of provisions for leave encashment written back. The tribunal had re-appreciated the factual position and examined the consistent practice followed by the assessee in obtaining valuation report for ascertaining the incremental leave encashment liability and after taking note of the entire facts, came to the conclusion that the final statements drawn by the assessee are in compliance with the statutory requirements, such as, the Companies Act and the computation of the total income has been done in accordance with the Act. Furthermore, the tribunal rightly noted that the liability was contingent in nature and has not crystallised into actual liability and will not be allowed as deduction while computing the total income. Thus the tribunal after re-examining the facts upheld the finding of the CIT(A). Thus, we find that no substantial question of law arising therefrom.

The second issue was with regard to whether the CIT(A) was correct in deleting the disallowance on account of foreign exchange fluctuation. On this issue, the tribunal perused the facts, the profit and loss accounts of the assessee and upheld the finding rendered by the tribunal by taking note of the decision of the Hon’ble Supreme Court in Commissioner of Income Tax, Delhi vs. Woodward Governor India (P). Ltd. reported in [2009]179

Taxman 326 (SC). Thus, there is no error in the finding rendered by the tribunal.

The tribunal was considering three other issues together and recorded its finding in paragraph 15 of the impugned order. The three issues being whether the CIT(A) was correct in deleting disallowance of obsolete stock written off by the assessee; whether the CIT(A) was right in deleting the disallowance of expenses for shifting of Chennai plant; and, whether CIT(A) was correct in deleting the disallowance on account of upfront fees, paid to ICICI Bank. We have perused the finding recorded by the tribunal and we find that the tribunal has elaborately discussed the facts before affirming the view taking by CIT(A). We find that no question of law much less substantial question of law arising for consideration.

The last ground was with regard to whether CIT(A) was correct in holding that the sale of factory land at Guindy, Chennai gave rise to capital gain and not to business profit. On this issue, the tribunal after noting the finding rendered by the assessing officer, as to how the CIT(A) reversed the same, on its part, re-examined the factual position and elaborately considered the matter, took note of the decision of the Hon'ble Supreme Court in CIT vs. G. Venkataswami Naidu reported in 35 ITR 594(SC) wherein the Hon'ble Supreme Court held that the question whether gain made out of purchase and sale of the land, is an accretion or capital profit which may depend on particular facts and circumstances. After noting the said decision, the tribunal on facts, held that the view taken by the CIT(A) was fully justified. Thus, we find that there is no error in the manner in which the tribunal has approached the matter on all the aforementioned issues and we find that there is no question of law much less substantial questions of law arising for consideration in this appeal.

In the result, the appeal (ITAT/96/2017) fails and stands dismissed. Consequently, the stay petition (IA No.GA/2/2017 (Old No.GA/830/2017) is also dismissed.”

Following the above decision in the assessee's own case substantial question nos.(a) and (c) are answered against the appellant/revenue.

With regard to substantial question no.(b) the Tribunal answered the said issue in favour of the respondent/assessee by following the decision of the Hon'ble High Court of Bombay in *Commissioner of Income Tax versus ACE Builders (P) Ltd.* reported in [2005]144 Taxman 855(Bombay). The said decision was noted with approval by the Hon'ble Supreme Court in the case of *Commissioner of Income Tax, Panji versus V.S. Dempo Company Limited* reported in [2016]74 taxmann.com 15(SC). The operative portion of the judgment reads as follows:-

“1. In the return filed by the respondent/assessee for the Assessment Year 1989-90 the assessee had disclosed that it had sold its loading platform M.V. Priyadarshni for a sum of Rs. 1,37,25,000/- on which it had earned some capital gains. On the said capital gains the assessee had also claimed that it was entitled for exemption under Section 54E of the Income Tax Act. Admittedly, the asset was purchased in the year 1972 and sold sometime in the year 1989. Thus, the asset is almost 17 years old. Going by the definition of long term capital asset contained in Section 2(29B) of the Income Tax Act, 1995 (hereinafter referred to

as 'the Act'), it was admittedly a long-term capital asset. Further the Assessing Officer rejected the claim for exemption under Section 54E of the Act on the ground that the assessee had claimed depreciation on this asset and, therefore, provisions of Section 50 were applicable. Though this was upheld by the Commissioner of Income Tax (Appeals), the Income Tax Appellate Tribunal allowed the appeal of the assessee herein holding that the assessee shall be entitled for exemption under Section 54E of the Act. The High Court has confirmed the view of the Commissioner of Income Tax (Appeals) and dismissed the appeal of the Revenue. While doing so the High Court has relied upon its own judgment in the case of *CIT v. ACE Builders (P.) Ltd.* [2006] 281 ITR 210/[2005] 144 Taxman 855 (Bom.). The High Court has observed that Section 50 of the Act which is a special provision for computing the capital gains in the case of depreciable assets is not only restricted for the purposes of Section 48 or Section 49 of the Act as specifically stated therein and the said fiction created in sub-section (1) & (2) of Section 50 has limited application only in the context of mode of computation of capital gains contained in Sections 48 and 49 and would have nothing to do with the exemption that is provided in a totally different provision i.e. Section 54E of the Act. Section 48 deals with the mode of computation and Section 49 relates to cost with reference to certain mode of acquisition. This aspect is analysed in the judgment of the Bombay High Court in the case of *ACE Builders (P.) Ltd.* (*supra*) in the following manner:

"In our opinion, the assessee cannot be denied exemption under Section 54E, because, firstly, there is nothing in Section 50 to suggest that the fiction created in Section 50 is not only restricted to Sections 48 and 49 but also applies to other provisions. On the contrary, Section 50 makes it explicitly clear that the deemed

fiction created in sub-section (1) & (2) of Section 50 is restricted only to the mode of computation of capital gains contained in Section 48 and 49. Secondly, it is well established in law that a fiction created by the legislature has to be confined to the purpose for which it is created. In this connection, we may refer to the decision of the Apex Court in the case of State Bank of India v. D.Hanumantha Rao 1998 (6) SCC 183. In that case, the Service Rules framed by the bank provided for granting extension of service to those appointed prior to 19.07.1969. The respondent therein who had joined the bank on 1.7.1972 claimed extension of service because he was deemed to be appointed in the bank with effect from 26.10.1965 for the purpose of seniority, pay and pension on account of his past service in the army as Short Service Commissioned Officer. In that context, the Apex Court has held that the legal fiction created for the limited purpose of seniority, pay and pension cannot be extended for other purposes. Applying the ratio of the said judgment, we are of the opinion, that the fiction created under Section 50 is confined to the computation of capital gains only and cannot be extended beyond that. Thirdly, Section 54E does not make any distinction between depreciable asset and non-depreciable asset and, therefore, the exemption available to the depreciable asset under Section 54E cannot be denied by referring to the fiction created under Section 50. Section 54E specifically provides that where capital gain arising on transfer of a long term capital asset is invested or deposited (whole or any part of the net consideration) in the specified assets, the assessee shall not be charged to capital gains. Therefore, the exemption under Section 54E of the I.T. Act cannot be denied to the assessee on account of the fiction created in Section 50."

2. We are in agreement with the aforesaid view taken by the High Court.”

Following the above decision which squarely applies in the case in hand, substantial question no.(b) is also answered against the revenue.

In the result, the appeal (ITAT/233/2018) is dismissed and the substantial questions of law are answered against the revenue for the reasons assigned in the preceding paragraphs.

Consequently, the connected application for stay (GA/2/2018) is also dismissed.

(T.S. SIVAGNANAM, J.)

(HIRANMAY BHATTACHARYYA, J.)