

OD-61

IN THE HIGH COURT AT CALCUTTA
Special Jurisdiction (Income tax)
ORIGINAL SIDE

IA No. GA/1/2017
(Old No. GA/2471/2017)
In
ITAT/274/2017

ESSEL MINING AND INDUSTRIES LTD.
-Versus-
PRINCIPAL COMMISSIONER OF INCOME TAX-2, KOLKATA

BEFORE:

The Hon'ble JUSTICE T. S. SIVAGNANAM

AND

The Hon'ble JUSTICE HIRANMAY BHATTACHARYYA

Date : 17th November, 2021.

Appearance:

Mr. J. P. Khaitan, Sr. Adv.

Ms. Swapna Das, Adv.

Mr. Pratyush Jhunjhunwala, Adv.

Mr. Siddharth Das, Adv.

... for the petitioner.

Mr. Debasis Choudhuri, Adv.

Mr. Madhu Jana, Adv.

... for the Revenue.

The Court: This appeal by the assessee is filed under Section 260A of the Income Tax Act, 1961 (the Act in brevity) and is directed against the order passed on 10.03.2017 by the Income Tax Appellate Tribunal in ITA Nos. 786 and 2073/Kol/2013 for the Assessment Year 2008-09. The assessee has raised the following substantial questions of law for consideration:

- (a) Whether the Tribunal was justified in law in upholding the invocation of rule 8D of the Income Tax Rules, 1962 in the appellant's case for the purpose of disallowance under section 14A of the Income Tax Act, 1961 and its purported findings in that behalf, including that the Assessing Officer had recorded his dissatisfaction with regard to the appellant's claim or that the appellant had not furnished any materials/evidence to show that no borrowed funds were utilised in making the investments, are arbitrary, unreasonable and perverse?
- (b) Whether the Tribunal was justified in law in holding that the compensation received by the appellant from Suzlon Energy Ltd. in terms of the purchase orders on account of failure of performance guarantee parameters of capital assets, namely, wind turbine generators, purchased by the appellant was on revenue account for reducing loss incurred in the course of business and not a capital receipt outside the purview of taxation?

We have heard learned Senior Counsel Mr. J.P. Khaitan appearing for the appellant/assessee and Mr. Debasis Choudhuri, learned Senior Standing Counsel for the respondent/Revenue.

The learned counsel for the appellant submitted that the appellant is not pressing for consideration substantial questions of law. The said submission is based on record. Therefore, we are required to decide as to

whether the compensation received by the appellant from M/s. Suzlon Energy Ltd. in terms of the purchase order on account of failure of performance guarantee parameters of capital assets purchased by the appellant was a capital receipt. The Assessing Officer held against the assessee and treated the same as a revenue receipt. On appeal, the Commissioner of Income Tax (Appeals) – VI (CITA), by an order dated 01.02.2013 reversed the decision of the Assessing Officer and directed the receipt to be treated as a capital receipt with a further direction to reduce the same from the value of the capital asset. The Revenue as well as the assessee filed appeals before the Tribunal. The Tribunal dismissed the assessee's appeal and the Revenue's appeal was allowed. The sheet anchor of the argument submitted by the assessee before the Tribunal was by placing reliance on the decision of the Hon'ble Supreme Court in the case of *Commissioner of Income Tax v. Saurashtra Cement Ltd.* reported in (2010) 325 ITR 422 (SC) as well as the decision of the Kolkata Bench of the Tribunal in the case of *DCIT v. Xpro India Ltd.* in ITA 214/Kol/2011 and *ACIT v. RDS Construction Pvt. Ltd.* in ITA 377 to 383/PN/2013. The Tribunal while interpreting the decision in *Saurashtra Cement Ltd. (supra)* went into the factual aspect and stated that in the said case, the compensation was paid for late delivery of the machinery whereas in the assessee's case, the compensation was paid on account of the machinery supplied not functioning to the optimum effect. In our considered view, the manner in which the Tribunal distinguished the decision in *Saurashtra Cement Ltd.* is incorrect. What is required to be considered by the Tribunal is the ratio laid

down by the Hon'ble Supreme Court in the said decision and then test the case of the assessee as to whether the compensation received should be treated as a revenue receipt or a capital receipt. In the case of *Rai Bahadur Jairam Valji [CIT v. Rai Bahadur Jairam Valji (1959) 35 ITR 148 (SC)]*, the Hon'ble Supreme Court after analysing the various judgments on the said point held that where by cancellation of an agency the trading structure of the assessee is impaired, or such cancellation results in loss of what may be regarded as the source of the assessee's income, the payment made to compensate for cancellation of the agency agreement is normally a capital receipt.

It is settled legal position that there is no singular test available to determine whether a receipt is a capital receipt or a revenue receipt for which it is necessary that the Assessing Officer should examine the facts of each case. Therefore, we are of the considered view that the manner in which the Tribunal had interpreted the decision of *Saurashtra Cement Ltd.* and come to a conclusion that it does not help the assessee is incorrect. The Tribunal is required to rely the legal proposition laid down in the Hon'ble Supreme Court as well as the other decisions which have been referred to by the Hon'ble Supreme Court. In fact one such decision which was relied on by the assessee in the said case was that of the High Court of Madras in *E.I.D. Parry Ltd. v. CIT [1998] 233 ITR 335*. For better appreciation, we quote paragraphs 11 and 12 of the decision in *Saurashtra Cement Ltd.* :

11. The question whether a particular receipt is capital or revenue has frequently engaged the attention of the courts but it has not

been possible to lay down any single criterion as decisive in the determination of the question. Time and again, it has been reiterated that answer to the question must ultimately depend on the facts of a particular case, and the authorities bearing on the question are valuable only as indicating the matters that have to be taken into account in reaching a conclusion. In **Rai Bahadur Jairam Valji** [1959] 35 ITR 148 (SC), it was observed thus (page 152):

“The question whether a receipt is capital or income has frequently come up for determination before the courts. Various rules have been enunciated as furnishing a key to the solution of the question, but as often observed by the highest authorities, it is not possible to lay down any single test as infallible or any single criterion as decisive in the determination of the question, which must ultimately depend on the facts of the particular case, and the authorities bearing on the question are valuable only as indicating the matters that have to be taken into account in reaching a decision. Vide **Van Den Berghs Ltd. v. Clark** [1935] 3 ITR (Eng Cas) 17. That, however, is not to say that the question is one of fact, for, as observed in **Davies (H. M. Inspector of Taxes) v. Shell Company of China Ltd.** [1952] 22 ITR (Suppl) 1 ‘these questions between capital and income, trading profit or no trading profit, are questions which, though they may depend no doubt to a very great extent on the particular facts of each case, do involve a conclusion of law to be drawn from those facts’.”

12. In **Kettlewell Bullen and Co. Ltd.** [1964] 53 ITR 261; AIR 1965 SC 65 dealing with the question whether compensation received by an agent for premature determination of the contract of agency is a capital or a revenue receipt, echoing the views expressed in **Rai Bahadur Jairam Valji** [1959] 35 ITR 148(SC)

and analysing numerous judgments on the point, this court laid down the following broad principle, which may be taken into account in reaching a decision on the issue (page 282):

“Where on a consideration of the circumstances, payment is made to compensate a person for cancellation of a contract which does not affect the trading structure of his business, nor deprive him of what in substance is his source of income, termination of the contract being a normal incident of the business, and such cancellation leaves him free to carry on his trade (freed from the contract terminated) the receipt is revenue : Where by the cancellation of an agency the trading structure of the assessee is impaired, or such cancellation results in loss of what may be regarded as the source of the assessee’s income, the payment made to compensate for cancellation of the agency agreement is normally a capital receipt.”

In the light of the above, we are of the view that the matter requires to be remanded to the Tribunal for a fresh consideration to consider the legal issue which was decided by the Hon’ble Supreme Court in *Saurashtra Cement Ltd.* It goes without saying that the Revenue also will be given adequate opportunity by the Tribunal to put forth their contentions on the grounds canvassed by the assessee before us in this appeal. In the result, the appeal is allowed and the order passed by the Tribunal is set aside on the subject issue alone, namely, whether the compensation received by the assessee from Suzlon Energy Ltd. in terms of the purchase orders on account of failure of performance guarantee parameters of capital assets, namely, wind turbine generators, purchased by the assessee was on revenue account made for reducing loss incurred in the course of business or a

capital receipt outside the purview of taxation and the matter shall be remanded to the Tribunal for a fresh decision on merits and in accordance with law.

The appeal is allowed and the substantial questions of law are left open.

The application stands disposed of.

(T. S. SIVAGNANAM, J.)

(HIRANMAY BHATTACHARYYA, J.)

sg/RS.