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IN THE HIGH COURT OF BOMBAY AT GOA

TAX APPEAL NO. 43 OF 2016

The Pr. Commissioner of Income Tax,
Having office at Aayakar Bhavan,
Patto- Plaza,
Panaji-Goa

..Appellant

Versus

1. M/s. Sesa Goa Ltd.,
Sesa Ghar, 20, EDC Complex,
Patto, Panaji.
PAN: AACCS7101B

...Respondent

Mrs. Susan Linhares, Advocate for the Appellant.

Mr. R. G. Ramani, Senior Advocate with Mr. P. Kakodkar, Advocate for the Respondent.

**CORAM: SUNIL P. DESHMUKH &
M. S. SONAK, JJ**

DATED: 2nd AUGUST, 2021

ORAL JUDGMENT (Per M.S. Sonak,J):

1. Heard Ms. Susan Linhares, the learned Advocate for the Appellant, and Mr. R. G. Ramani, the learned Senior Advocate with Mr. P. Kakodkar, Advocate for the Respondent.

2. The learned counsel for the parties states that they have no objection to this Bench taking up this matter.

3. This appeal was admitted on 4/10/2016 on the following substantial question of law:

(1) Whether Hon'ble Income Tax Appellate Tribunal is justified in law in placing simpliciter reliance on the order in ITA No. 187/PNJ/2014 dated 28.11.2014, in order to dismiss the Appeal filed by the revenue, without discussing and considering the facts interse between the assessee's case in the present proceedings?

4. However, today, Ms. Linhares pointed out that the case number referred to in the above substantial question of law is incorrect and the correct case number is ITA No.72/PNJ/2012 which was decided on 8/3/2013. Mr. Ramani also agrees that there was an error about the correct case number in the substantial question of law framed on 4/10/2016.

5. Therefore, with the consent of the learned counsel for the parties, the above substantial question of law is to be re-framed to read as follows:

(1) Whether Hon'ble Income Tax Appellate Tribunal is justified in law in placing simpliciter reliance on the order in No.ITA No.72/PNJ/2012 dated 8/3/2013, in order to dismiss the Appeal filed by the revenue, without discussing and considering the facts interse between the assessee's case in the present proceedings.

6. On 29/9/2009, for the assessment year 2009-2010, the respondent-assessee filed an E-Return declaring a total income of Rs.2007,48,80,920. This return was taken up for scrutiny, and the Assessing Officer (A.O) vide his order dated 28/12/2012 concluded that the assessee made an incorrect claim of deduction in an amount of Rs.451,27,84,122/- by disregarding the Judgment of the Hon'ble Supreme Court in the case of the respondent-assessee itself. On this basis, the A.O levied a penalty of Rs.200,00,00,000/- under section 271C of the Income Tax Act 1963 (IT Act).

7. The respondent-assessee appealed the order dated 28/12/2012 and the Commissioner of the Income Tax (Appeals), allowed the appeal vide order dated 17/2/2014 and ordered the deletion of the penalty imposed by the A.O.

8. The appellant-revenue appealed the order dated 17/2/2014, but the Income Tax Appellate Tribunal (ITAT) vide its order dated 8/3/2013, dismissed the Revenue's Appeal and upheld the deletion of the penalty by the Commissioner of Income Tax (Appeals). Hence, the present appeal on the aforesaid substantial question of law.

9. The main issue involved before the Commissioner of Income Tax (Appeals) and the ITAT was whether the respondent-assessee had made an incorrect claim for deduction in its E-Return filed on 29/9/2009.

10. In the substantive appeal instituted by the respondent-assessee, the ITAT, by its order dated 8/3/2013 in ITA No.72/PNJ/2012 held that there was no error on the part of the respondent-assessee in claiming exemption under section 10-B of the IT Act and on the said basis seeking the deduction in the E-Return filed on 29/9/2009. The relevant discussion on this issue is to be found in paragraphs 45.21 and 45.22 of the order dated 8/3/2013 and the same read as follows:

“45.21 In view of the aforesaid discussion, we are of the view that the assessee is entitled for exemption u/s 10B in respect of all the three 100% Export Oriented Units, but during the course of the hearing, we noted that the assessee while computing the exemption u/s 10B has debited ore extracted from own mines in Amona unit as well as Chitradurga unit at cost of Rs. 45,25,23,692/- and Rs. 20,27,01,458/- respectively, while in view of provisions of Section 10B(7) read with Section 80-IA(8) the assessee is required to transfer the crude ore

extracted from its own mines at market value for determining the true profit derived by the 100% EOU for the purpose of computing the income illegible for exemption u/s 10B. We also noted that the assessee has also purchased crude ore i.e ROM from outside parties i.e from mining belonging to the other parties. The price paid by the assessee to these outside parties, in our opinion can be regarded to be the best evidence for determining the market value of the crude ore used by the assessee extracting it from its own mines. Since the determination of market value requires verification on the part of the revenue, we, therefore, restore this issue only for determining the market value of the crude ore consumed by the assessee on the basis of the value paid by the assessee for the crude ore to the outside parties during the year and thereby recomputing the profit derived by the assessee from the 100% EOU units eligible for exemption u/s 10B. Accordingly, we direct the Assessing Officer to recompute the exemption available u/s 10B to the assessee in respect of Amona as well as Chitradurga units after ascertaining the market value of the crude ores transferred by the assessee to these units from its extraction divisions on the basis of the average market value as the assessee has paid to the outside parties for the crude ores purchased by the assessee from these parties during the impugned assessment year and substituting as cost of the raw material in place of cost of the crude ore derived by the assessee from its own mines after giving proper and sufficient opportunity to the assessee to adduce the

material and evidence in this regard.

45.22 With regard to Codli unit, the assessee claimed before us that the input, in this case, is 'tailings' which is merely a waste product and does not involve any cost and also has not fetched any price in the open market, ITA No. 72&85/PNJ/2012 therefore, its market value is nil for the purpose of computation of profit eligible for exemption u/s 10B from this unit. We find force in the submission of the assessee but in the interest of justice and fair play to both the parties, in respect of this unit also we direct the assessing officer to recompute the profit of this unit eligible for exemption after satisfying himself about the fair market value of 'tailings' after giving proper and sufficient opportunity to the assessee to prove the market value of the tailings used in the Codli unit and allow the assessee exemption to the assessee u/s 10 B of the Income-tax Act, 1961 for Codli unit on the profit so recomputed accordingly. The assessee is directed to adduce the necessary evidence on which it may rely to prove the market value of inputs before the assessing officer. Thus, the ground nos. 7, 8 & 9 are partly allowed."

11. The ITAT, whilst making its impugned order in the present matter naturally relied upon its order dated 8/3/2013 in ITA No.72/PNJ/2012 and held that since there was no error in claiming the deduction in the E-Return, the levy of penalty was neither legal nor proper.

12. At the time when this appeal was admitted, the ITAT's order dated 8/3/2013 in ITA/72/PNJ/2012 had not been tested by this Court though, the Revenue had instituted Tax Appeal Nos.13 and 14 of 2013 and 25 of 2014 against the same. Recently, by Judgment and order dated 7/5/2021 these Tax Appeals were dismissed, thereby, confirming that the respondent-assessee had quite correctly claimed the deduction in its E-Return filed on 29/9/2009.

13. Now, that this Court has dismissed the Revenue's appeal against the order dated 8/3/2013 in ITA No.72/PNJ/2012, it is quite clear that there was no error on the part of the respondent-assessee in claiming the deduction in its E-Return. Since there was no error, there was obviously, no question of imposing any penalty upon the respondent-assessee. Even, otherwise, an erroneous claim simpliciter does not automatically attract a penalty. It is only when an erroneous claim is based on a deliberate misrepresentation of facts or deliberate suppression of relevant material facts, that, a penalty is imposed after the deduction is denied. In this case, the deduction was ultimately allowed and, therefore, there was no question of levy of any penalty.

14. The concurrent findings recorded by the Commissioner of IT (Appeals) and the ITA, therefore, warrant no interference, inter alia having regard to the absence of any perversity and the aforesaid development involving the dismissal of the Revenue's Appeal Nos. 13 and 14 of 2013 on 7/5/2021.

15. For all the aforesaid reasons the substantial question of law as now re-framed will have to be answered against the Revenue

and in favor of the Assessee. Resultantly, this appeal fails and is hereby dismissed.

M. S. SONAK, J

SUNIL P. DESHMUKH, J

MARIA
AURA
PEREIRA

Digitally signed
by MARIA AURA
PEREIRA
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