

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

RESERVED ON: 14.06.2022
DELIVERED ON: 21.06.2022

CORAM:

**THE HON'BLE MR. JUSTICE T.S. SIVAGNANAM
AND
THE HON'BLE MR. JUSTICE HIRANMAY BHATTACHARYYA**

ITAT/156/2018

IA NO: GA/1/2018(OLD NO. GA/1141/2018)

IA NO: GA/2/2018(OLD NO. GA/1142/2018)

**PRINCIPAL COMMISSIONER OF INCOME TAX KOL-4, KOLKATA
VERSUS
M/S XPRO INDIA LTD.**

Appearance:-

Ms. Smita Das De, Adv.

.....For the Appellant.

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

Mr. Pratyush Jhunhunwala, Adv.

Mr. P.K. Jhunhunwala, Adv.

Mr. S. Rudra, Adv.

.....For the Respondent.

JUDGMENT

(Judgment of the Court was delivered by T.S.SIVAGNANAM, J.)

1. This appeal by the revenue filed under Section 260 A of the Income Tax Act, 1961 (the Act for brevity) is directed against the order dated 23.03.2016 passed by the Income Tax Appellate Tribunal A Bench, Kolkata in ITA No. 214/Kol/2011 for the assessment year 2005-6.
2. The revenue has raised the following substantial questions of law for consideration :

Q1. Whether on the facts and in the circumstances of the case, the Learned Tribunal erred in law in holding that no slump sale had taken place within the meaning of Section 2 (42C) of the Income Tax Act though no proper valuation of the transferred asset was made.

Q2. Whether on the facts and in the circumstances of the case, the Learned Tribunal was justified in holding that no slump sale had taken place within the meaning of Section 50B of the Act though loans and liabilities were not transferred and therefore the net worth of the Unit was never computed.

Q3. Whether on the facts and in the circumstances of the case, the Learned Tribunal was justified in overlooking the fact that machineries sold were held for a period of less than 36 months leading to Short Term Capital Gains.

Q4. Whether on the facts and in the circumstances of the case, the Learned Tribunal was justified in deleting the disallowance made by the Assessing Officer on account of bad debt due to failure of the assessee to establish the nature of debt and identity of the debtors.

Q5. Whether on the facts and in the circumstances of the case, the Learned Tribunal was justified in deleting the disallowance made by the Assessing Officer on account of bad debt by considering that such debt was featured in the accounts of the Unit of the assessee sold during the year, without having any materials on record to corroborate such conclusion.

Q6. Whether on the facts and in the circumstances of the case, the Learned Tribunal was justified in law in deleting the disallowance made by the Assessing Officer on account of bad debt by considering that such debt, after being recovered was offered to tax in subsequent year, without referring the matter to the Assessing Officer for verification.

Q7. Whether on the facts and in the circumstances of the case, the learned Tribunal erred in law in confirming the finding of the CIT(A) on the issue of disallowance of depreciation proportionate to the compensation received by the assessee by reducing the value of compensation to Rs. 95,79,985/- from Rs. 3,52,06,915/- as assessed by the Assessing Officer thereby disallowing depreciation to Rs. 88,01,729/- being 25% of Rs. 3,52,06,915/-.

Q8. Whether on the facts and in the circumstances of the case, the Learned Tribunal erred in law in not appreciating that the assessee company has capitalized 100% of the value of the assets and claimed depreciation on the same.

Q9. Whether on the facts and in the circumstances of the case, the Learned Tribunal erred in law in deleting the addition made by the Assessing Officer under Section 36 (1) (va) read with Section 2 (24) (x) of the Act for belated payment of employees contribution to the provident fund by applying the provisions of Section 43B of the Act which is applicable for the employers contribution only.

Q10. Whether on the facts and in the circumstances of the case, the Learned Tribunal erred in law in deleting the disallowance made by the Assessing Officer on the issue of bad debt written off amounting to Rs. 42,15,084/- without referring the matter back to the Assessing Officer for reconsideration.

3. We have heard Ms. Smita Das De, learned Senior Standing Counsel for the appellant revenue and Mr. J.P. Khaitan, learned Senior Counsel assisted by Mr. Pratush Jhunhunwala, M. P.K. Jhunhunwala and Mr. S. Rudra, learned Advocates for the respondents.

4. The assessee filed their return of income for the assessment year under consideration, AY 2005-06, on 27.10.2005 declaring total income of Rs. 5,87,51,962/-. The return was processed under Section 143 (1) of the Act. Thereafter, the case was selected for scrutiny and notice under Section 143 (2) was issued on 27.06.2006 and notice under Section 142 (1) was issued on 04.06.2007 and thereafter the case was discussed with the authorized representative of the assessee and the assessment was framed by Order dated 28.12.2007 under Section 143 (3) of the Act. Totally 4 issues arise for consideration in the instant case, the first of which pertains to sale of an undertaking called as Biax Division Unit II and whether it was slump sale or otherwise. The Assessing Officer held the transaction to be treated as a slump sale as per provisions of Section 50B of the Act. The second issue was with regard to the bad debts written off by the assessee. The Assessing Officer refused to allow the deduction sought for by the assessee on the ground that the assessee has not furnished the requisite information and the said amount was added to the total income of the assessee. The third issue

is with regard to the compensation received from M/s. Batenfeld, UK whether it has to be treated as a capital receipt as claimed by the assessee in its return of income. The Assessing Officer held the compensation received is nothing but a specific amount which has been paid to the assessee to make good the price of the machine which has been paid by the assessee to Batenfeld and though the same is a capital receipt, but it has to be reduced from the cost of the machine as it has been specifically provided and compensated to the assessee. The fourth issue is with regard to the addition made by the Assessing Officer under Section 36 (1) (ba) read with Section 2 (24) (x) of the Act for belated payment of employees contribution to the Provident Fund Organization by applying the provisions of Section 43 B of the Act.

5. With regard to the issue pertaining to slump sale, the CIT (A), XII, Kolkata before whom the assessee challenged the assessment order, examined the business transfer agreement and held that the provisions of Section 50 B is not applicable to the appellant's case. This finding was affirmed by the Tribunal after taking note of the decision of the Tribunal in the case of **DCIT versus Tongani Tea Co. Ltd.**¹ With regard to the second issue namely, the bad debts, the CIT (A) held that the assessee has satisfied the conditions under Section 36 (1) (vii) read with Section 36 (2) of the Act and therefore, the Assessing Officer was not justified in disallowing the claim of bad debts. The Tribunal after taking note of the finding recorded by the CIT (A) noted that the bad debts claimed by the assessee were recovered

¹ (2015) 63 taxmnn.com 149 (Kol Trib.)

in the subsequent year AY 2006-07 and offered for taxation and the revenue could not bring anything on record contrary to the finding recorded by the CIT (A). With regard to the compensation, the CIT (A) disagreed with the finding of the Assessing Officer that the compensation received, would go to reduce the cost of machinery which included waiver of 10% of invoice value of machinery. The CIT (A) taking note of the decision of the Hon'ble Supreme Court in **Sourashtra Cement Ltd.** and noting that 10% of the invoice value which was not paid by the assessee, would definitely go to reduce the cost of machinery capitalized by the assessee, directing the Assessing Officer to restrict the disallowance of depreciation of Rs. 95,79,985/- which is 10% of the invoice value of the machinery reducing the written down value (WDV), of the machinery and accordingly held that the compensation of Rs. 2,56,26,930/- received by the assessee is a capital receipt as it does not reduce the cost of the machinery. The Tribunal after taking note of the settlement arrived at between the assessee and Batenfeld approved the finding recorded by the CIT (A). With regard to the last issue namely, belated remittance of the employee's contribution to the Provident Fund Organization, the Tribunal referred to the decision of this Court in the case of **CIT versus Vijay Shree Ltd., ITAT No. 245 of 2011** dated 07.09.2011 and held in favour of the assessee. Aggrieved by the conclusion arrived at by the Tribunal, affirming the order passed by the CIT (A) the revenue is before us by way of this appeal.

6. The substantial questions of law No. 1 to 3 deal with the slump sale issue. We have carefully gone through the order passed by the Assessing

Officer and that of the CIT (A) and the Tribunal. The CIT (A) has minutely examined the business transfer agreement and noted that the unit was not sold as a going concern but the assets were sold as individual assets, the valuation has been done separately, the valuation of the land has been separately mentioned in the valuer's report and that the assessee has not transferred the undertaking with all the assets and liabilities. Further, all financial assets available with the assessee up to the date of transaction, were not transferred but retained by the assessee. Further, the assessee had assumed all the liabilities including the statutory liabilities till the date of transfer and therefore, held that the transfer cannot be treated as a slump sale under Section 50E of the Act. The Tribunal re-examined the facts and found that the transferee has not taken over all the loans and liabilities. The Tribunal placed reliance on its decision in the case of **Tongani Tea Co. Ltd.** and the appeal filed by the revenue against the said decision in ITAT No. 203 of 2016 was dismissed by the Division Bench of this Court. Therefore, we find that there is no error in the finding recorded by the Tribunal on the said issue. Accordingly, substantial questions of law No. 1 to 3 are answered against the revenue.

7. The Second issue is with regard to bad debts and this issue has been raised in substantial questions of law No. 4, 5, 6 and 10. The CIT (A) found that it is not in dispute that the debts were written off as trade debt of the assessee's Biast Division II, the said unit was purchased by the assessee during the financial year 2003-04 and sold in the financial year 2004-05 and the trade debt would be of the year 2003-04 or 2004-05. Further, the

Tribunal noted that there is no dispute to the fact that the debt was actually written off in the books of accounts in the assessment year under consideration namely, 2005-06. The business transfer agreement was examined and it was noted that as on the date of transfer the sundry debtors were not transferred to the joint venture company and therefore held that there is no reason to reject the claim of bad debts made by the assessee. The Tribunal affirmed the said order by taking note of the terms of the agreement between the parties and also the fact that the bad debts claimed by the assessee in the year under consideration were recovered in the subsequent assessment year 2006-07 and offered for taxation which fact could not be denied by the revenue. Thus, we find that the CIT (A) and the Tribunal rightly interpreted the factual position and granted relief to the assessee and there is no reason for us to interfere with the said orders. Accordingly, substantial questions of law No. 4, 5, 6 and 10 are answered against the revenue.

8. The next issue is with regard to the compensation received from M/s. Batenfeld, UK. The Assessing Officer was of the view that the entire amount of compensation had reduced the cost of the machinery and therefore, denied relief to the assessee. The correctness of the said finding was considered by the CIT (A) and after noting that the entire amount of compensation would not reduce the actual cost of machinery and there is no dispute to the fact that the assessee had capitalised the full invoice value of machinery in its books of accounts and accordingly, claimed depreciations and noting the decision of the Hon'ble Supreme Court in **Sourashtra**

Cement Ltd. directed the Assessing Officer to restrict the disallowance of depreciation pertaining to 10% of the compensation received by the assessee which will go to reduce the cost of machinery, and for the remaining amount the assessee's case was accepted. With regard to the 10% of the amount which was directed to be restricted, the assessee was not an appeal before the Tribunal. The Tribunal after considering the findings recorded by the CIT (A) examined the settlement which was executed between the assessee and the UK Company which show that the compensation was given on account of non-achievement of performance parameters. After noting the relevant clauses in the settlement agreement, the Tribunal held that the condition specified in Section 143 (1) of the Act for directing the actual cost from value of the machines were applicable to the compensation amount paid to the assessee. We find there is no error in the approach of the Tribunal or that of the CIT (A) for us to interfere. Accordingly, substantial questions of law No. 7 and 8 are answered against the revenue.

9. The last issue pertains to belated payment of the employee's contribution to Provident Fund Organisation. The Tribunal granted relief to the assessee by following a decision of this Court in **Vijay Shree Ltd.** However, we note that other appeals have been admitted on the said issue and are pending before this Court. In any event a need may not arise to decide the said issue because the tax effect on the said issue is only Rs. 50,289/- and therefore, the revenue cannot pursue the appeal on the said issue on the ground of low tax effect. Therefore, the substantial question of law No. 9 is left open as a tax effect on the said issue is only Rs. 50,289/-.

10. In the result, the appeal filed by the revenue is dismissed and the substantial questions of law No. 1 to 8 and 10 are answered against the revenue for the reasons set out in the preceding paragraphs. Substantial questions of law No. 9 is left open but the appeal stands dismissed on the said issue on the ground of low tax effect.

(T.S. SIVAGNANAM, J.)

I agree

(HIRANMAY BHATTACHARYYA, J.)

(P.A.-PRAMITA)