OD-34

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

ITAT/225/2022
IA No. GA/2/2022

PRINCIPAL COMMISSIONER OF INCOME TAX 2, KOLKATA
VS
M/S KESORAM INDUSTRIES LTD.

BEFORE :

THE HON'BLE JUSTICE T.S. SIVAGNANAM
And
THE HON'BLE JUSTICE HIRANMAY BHATTACHARYYA
Date : 20th December, 2022

Appearance :
Mr. Om Narain Rai, Adv.
Mr. Soumen Bhattacharjee, Adv.
…for the appellant.

Mr. J.P. Khaitan, Sr. Adv.
Ms. Nilanjana Banerjee Pal, Adv.
…for the respondent.

The Court : This appeal filed by the revenue under Section 260A of the Income Tax Act, 1961 is directed against the order dated 28th January, 2021 passed by the Income Tax Appellate Tribunal, 'C' Bench, Kolkata in ITA Nos.1778/Kol/2019 for the Assessment Year 2014-15.

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

i) Whether the Learned Tribunal has committed substantial error in law in not appreciating that arm's length price and fair market value are two different concepts and the role of TPO is limited to determination of Arm's Length Price ?

ii) Whether the Learned Tribunal has committed substantial error in law in not appreciating that Explanation to Section 80IA has to be interpreted to mean that in case where the monetary threshold as per Section 92BA is crossed, market value has to mean Arm's Length Price or ALP i.e. as per limb (ii) of the said Explanation ?

iii) Whether the Learned Tribunal has committed substantial error in law in not upholding the internal CUP applied by the assessee to benchmark the transaction (sale or power) to its AE, as well as computation of deduction under Section 80IA of the Act, whereas as per explanation to Section 80IA(8) of the Act, `market value', in relation to any goods or services, means –

(a) the price that such goods or services would ordinarily fetch in the open market; or

(b) the arm's length price as defined in clause (ii) of Section 92F, where the transfer of such goods or services is a specified domestic transaction referred to in Section 92BA.

iv) Whether the Learned Tribunal has committed substantial error in law in not appreciating the finding of the TPO that the assessee's generating unit cannot as such claim any benefit under Section 80IA of the Income Tax Act computed on the basis of rates charged by the distribution license from the consumer. The benefit can only be claimed on the basis of the rates fixed by the tariff regulation commission for sale of electricity by the generating companies to the distribution company ?

v) Whether the Learned Tribunal has committed substantial error in law in not analysing the claim of deduction allowable under the provisions of Section 80IA r.w.s. 92BA and 92F of the Income Tax Act, 1961 and relevant judicial pronouncement of the jurisdiction Hon'ble Calcutta High Court ?

vi) Whether the Learned Tribunal has committed substantial error in law in not appreciating the application of CUP method does not require determination of tested party ?

vii) Whether the Learned Tribunal has committed substantial error in law in not appreciating that a manufacturer cannot be compensated based on rates meant for distributors ?

viii) Whether the Learned Tribunal has committed substantial error in law in not appreciating that tariff orders are regulated but not controlled and therefore rates of sale of power by generating company to distributing company serve as valid CUP ?

ix) Whether the Learned Tribunal has committed substantial error in law in not appreciating that there is significant difference between distribution tariff and generation tariff and such cost difference are real and not imaginary ?

x) Whether the Learned Tribunal has committed substantial error in law in granting relief on account of discount allowed to various parties while the sales were already recognized after netted off the discounts ?

We have heard Mr. Om Narain Rai, learned standing counsel appearing for the appellant/revenue and Mr. J.P. Khaitan, learned Senior Advocate for the respondent/assessee.

It is pointed out by the learned Senior Counsel appearing for the respondent/assessee that the substantial questions of law (a), (b), (c), (d), (e), (f) and (g) though raised by the revenue, have become academic in the instant case as no deduction has been allowed by the Assessing Officer as there was no gross total income during the assessment year under consideration namely, Accounting Year 2015-16. In this regard, our attention has been drawn to the assessment order dated 31st December, 2018 and on perusal of the computation of total income at a normal provision, we find no gross total income had arisen in the said assessment year. For better appreciation, the same is quoted hereinbelow :-

"Computation of Income under Normal Provision:

Total Income as per Computation of Income		(-)	Rs.413,59,34,407/-
Add :			
(i) Delay in employee's contribution	Rs. 3,70,827/-		
(ii) Disallowance of discount	Rs.2,36,88,659/-		
(iii) Disallowance u/s 14A	Rs.1,21,20,012/-		
(iv) Disallowance u/s 68	Rs. 63,50,000/-		Rs.4,25,29,498/-
		(-)	Rs.409,34,04,909/-
Assessed Income		**(-)**	**Rs.409,34,04,909/-**
Tax			Rs. Nil

Determination of Book Profit u/s 115JB

Book Profit u/s. 115JB as per return of income	(-)	Rs. 458,61,30,255/-
Add:		
(i) Provisional Disallowance u/s. 14A		Rs. 1,21,20,012/-
Revised Book Profit	**(-)**	**Rs. 457,40,10,243/-**
Tax @ 18.5% on above		Rs. Nil

Assessed u/s. 143(3) of the Income Tax Act, 1961 at a loss of **Rs.409,34,04,909/-.** Issue copy of order, computation of tax, demand notice and penalty notice to the assessee."

In the light of the undisputed position, the substantial questions of law (a), (b), (c), (d), (e), (f), (g) and (h) have become academic and need not be decided in this appeal and consequently, they are left open.

So far as the substantial question of law (h) in the stay petition is concerned, we find that the decision of the learned Tribunal has been rendered appreciating facts and circumstances of the case which have not been shown to be in the perverse or unsustainable. Therefore, no such substantial question of law arises for consideration.

So far as the substantial question of law (i) in the stay petition is concerned, it seen from the order of the learned Tribunal that it does not arise out of the order of the Tribunal and therefore, the same stands rejected.

So far as the substantial question of law (j) in the stay petition suggested by the revenue is concerned, on perusal of the order passed by the learned Tribunal, we find that the entire matter is factual which has been elaborately discussed by the Tribunal and arrived at a conclusion which has not been shown to be perverse or unsustainable. Therefore, no substantial question of law arises for consideration on the said ground. Therefore, substantial question of law (j) stands rejected.

In the result, the appeal is dismissed and it is held that substantial questions of law (a), (b), (c), (d), (e), (f) and (g) have become academic for the assessment year under consideration and therefore they are left open.

The substantial questions of law (h), (i) and (j) are rejected.

(T.S. SIVAGNANAM, J.)

(HIRANMAY BHATTACHARYYA, J.)

s.pal/SN.