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

ITAT/421/2016
IA NO: GA/1/2016 (OLD NO. GA/3475/2016)
GA/2/2016 (OLD NO. GA/3477/2016)
PRINCIPAL COMMISSIONER OF INCOME TAX 4, KOLKATA
VS.
INTERNATIONAL SEAPORTSL (HALDIA) PVT. LTD.

BEFORE :
THE HON'BLE JUSTICE T.S. SIVAGNANAM
And
THE HON'BLE JUSTICE HIRANMAY BHATTACHARYYA
Date : AUGUST 01, 2022.
[Via Video Conference]

Appearance :
Mr. Tilak Mitra, Adv.
Mr. Prithu Dudhoria, Adv.,
....for appellant

GA/1/2016 (OLD NO. GA/3475/2016)

The Court : There is a delay of 63 days in filing the appeal.

Affidavit-of-service has been filed by the appellant on 5th July, 2017 stating that the notice sent by registered post with acknowledgement due has been served upon the respondent/assessee on 29th October, 2016. Despite service of notice respondent did not appear. In any event, the delay is only 63 days and, therefore, we exercise our discretion to condone the delay in filing the appeal. Accordingly, the application for condonation of delay is allowed.

ITAT/421/2016

This appeal by the revenue under Section 260A of the Income Tax Act, 1961 (the Act) is directed against an order dated 28th January 2016 passed by the Income Tax

Appellate Tribunal "D" Bench (Tribunal) in ITA No.1194/Kol/2010 for the assessment year 2004-05.

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

i) Whether on the facts and in the circumstances of the case, the Learned Tribunal erred in law in not considering the income earned by the assessee during trial run as business income totally ignoring the ratio of the judgement delivered by the Hon'ble Supreme Court in the case of Tutikorin Alkali Chemicals & Fertilizers Ltd. versus CIT reported in 227ITR 172(SC) where the income earned during trial run was treated as business income?

We have heard Mr. Tilak Mitra, learned standing Counsel appearing for the appellant. Though notice has been served on the respondent none appears for the respondent. The respondent's case is that the income earned by the assessee during trial run is not business income and in this regard the revenue has placed reliance on the decision of the Hon'ble Supreme Court Tutikorin Alkali Chemicals & Fertilizers Ltd. versus CIT reported in 227ITR 172(SC). We have perused the materials on record and in particular findings recorded by the Tribunal from paragraph 8 of this order. After noting the factual position the Tribunal in our considered view rightly distinguished the decision in Tutikorin Alkali Chemicals & Fertilizers Ltd. versus CIT reported in 227ITR 172(SC). The relevant portion of the order is as follows :-

"We also further observe that the facts of the case law cited by the AO i.e. Tutikorin Alkali Chemicals & Fertilizers Ltd. (supra) for treating the receipts of trial run as business receipt are different from the facts of the instant case. The Apex Court in the said case has treated the interest income on the surplus fund as income from other sources because there was no nexus between the activity of the assessee and interest income. The assessee has invested idle fund for short period of time before the commencement of the business. There was no connection between interest income and the business of the assessee. The interest income was independent and separate from the business of the assessee. However, in the instant case the income generated during trial run is very much connected with the business of the assessee hence the question of recognizing the income does not arise as the commercial operation has not began. In view of the above we reverse the order of the ld. CIT(A) and allow the appeal of the assessee."

Apart from that learned Tribunal also placed reliance on the decision of the Delhi High Court in the case of *Commissioner of Income Tax Vs. Nestor Pharmaceuticals limited 322 ITR 631.* Thus, we find that the tribunal rightly appreciated the factual position and then granted relief to the assessee. Thus, we find there is no question of law much less substantial question of law arises for consideration in this appeal.

Accordingly, the appeal fails and the same is dismissed.

Consequently, the stay application, GA/2/2016 (OLD NO. GA/3477/2016) stands closed.

(T.S. SIVAGNANAM, J.)

(HIRANMAY BHATTACHARYYA, J.)

Pkd/GH