IN THE HIGH COURT OF JUDICATURE AT PATNA
Civil Writ Jurisdiction Case No.1198 of 2023

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Bihar Police Building Construction Corporation Pvt. Ltd, Through its Chief Accounts Officer of Hemant Kumar, 5 B.M.P Campus, P.O Veterinary College, P.S. Hawai Adda Dist-Patna, Bihar-800014

... ... Petitioner/s

Versus

1. Principal Chief Commissioner of Income Tax, C.R. Building, Bir Chand Patel Path Patna, P.S Kotwali 800001
2. Commissioner of Income Tax, C.R. Building, Bir Chand Patel Path, P.S Kotwali Patna. 800001
3. Additional Commissioner, Government of India, Ministry of Finance, Income Tax Department, National E Assessment Centre, Delhi
4. Joint Commissioner, Government of India, Ministry of Finance, Income Tax Department, National E Assessment Centre, Delhi
5. Joint Commissioner of Income Tax, Lok Nayak Bhawan, Dakbanglow Raod, P.S. Kotwali Patna 800001
6. Dy. Commissioner, Government of India, Ministry of Finance, Income Tax Department, National E Assessment Centre, Delhi
7. Deputy Commissioner of Income Tax, Lok Nayak Bhawan, Dakbanglow Road, P.S Kotwali Patna 800001
8. Assistant Commissioner, Government of India, Ministry of Finance, Income Tax Department, National E Assessment Centre, Delhi
9. Assistant Commissioner of Income Tax, Lok Nayak Bhawan, Dakbanglow Road, P.S Kotwali Patna 800001

... ... Respondent/s

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Appearance :

For the Petitioner/s	:	Mr. Prakash Sahay, Advocate
For the Respondent/s	:	Mr. Archana Sinha @ Archana Shahi, Sr. SC, Income Tax

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CORAM: HONOURABLE THE CHIEF JUSTICE
and
HONOURABLE MR. JUSTICE PARTHA SARTHY

ORAL JUDGMENT
(Per: HONOURABLE THE CHIEF JUSTICE)

Date : 25-07-2023

The writ petition is filed against the assessment order of the assessment year 2011-12 and the claim is of depreciation which stood rejected and reduced by the Assessing Officer in proceedings initiated under Section 147 read with Section 148 of the Income Tax Act, 1961. We have to immediately notice that the said contention cannot be urged in a petition under Article 226 and an appeal at this point is grossly barred by limitation, especially considering the fact that the order was dated 30.12.2017. The writ petition itself was filed delayed.

2. We have looked at the merits of the matter also. The Assessee had claimed 50% depreciation on a building claiming it to be a temporary structure. The same was not noticed while the assessment was completed under Section 143(3) of the Income Tax Act but later the excess depreciation claimed was taken as a ground for reopening of the assessment under Section 147 read with Section 148. The Assessee claimed that it is a temporary structure and relied on the decisions in ***Commissioner of Income Tax, Madras v. Madras Auto Service (P) Ltd. r***eported in**1998 6 SCC 604 *;*** a decision of the Hon'ble Supreme Court and of the Hon'ble High Court of Madras in ***Commissioner of Income Tax v. Ayesha Hospital P. Ltd., (2007) 292 ITR 266.***

3. The Assessing Officer found that the impugned

structure has been standing for 20 years and that it was renovated and beautified for use as a conference hall. The asset was found to be a building existing for more than an year, thus, limiting the claim of depreciation to 10% as against the returned claim of 50%.

4. Madras Auto Service P. Ltd. (*supra*) was a case in which the Assessee had obtained lease of premises over a period of 39 years in which there was a old building which was demolished and a new building constructed, to suit the business of the Assessee. Under the terms of the lease, the new building belonged to the lessor but, however, the Assessee/as lessee occupied it on a extremely low rent, as stipulated in the lease agreement. The Hon'ble Supreme Court held that an expenditure has to be looked at from a commercial point of view. The advantage obtained by the Assessee by constructing a building, the ownership of which was on somebody else, for the purpose of obtaining a long lease of a new building, suitable to it's business needs, that too at a concessional rate, was found to be a revenue expenditure. In fact, the saving in expenditure by reason of the low rent made also a revenue expenditure and not a capital expenditure. Ayesha Hospitals (*supra)* was also a case in which a Private Limited Company was running a hospital in a

leased premise, on which premise maintenance was carried out. The Assessing Officer treated it as a capital expenditure. The High Court held that though the building belonged to the Directors, the owners were separate entities returning the rental income and also paying tax on the profits arising out of the hospital. Following Madras Auto Service (P) Ltd., it was held that expenditure incurred on construction of a leased premises by the Assessee was deductible as revenue expenditure.

5. In the above case, the Assessee had claimed depreciation at the rate of 50% on the ground that the building was a temporary structure. In fact, as per Rule 5 read with appendix 1 of the Income Tax Rules, 1962. Purely temporary erections such as wooden structures are entitled to 100% depreciation and as has been found in the aforesaid judgment, if it is a temporary structure, there could even be a claim raised as a revenue expenditure, however, in the present case the claim was of 50% depreciation, which cannot be allowed. In fact, appendix 1 provides for only 10% depreciation for buildings other than used for residential purpose and not covered by sub-items 1 and 3. In the above circumstances, there is absolutely no valid claim for the assessee to obtain a 50% depreciation.

6. We find absolutely no reason to interfere with

the order of the Assessing Officer especially in a petition under Article 226.

7. The writ petition stands dismissed.

(K. Vinod Chandran, CJ)

(Partha Sarthy, J)

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CAV DATE	
Uploading Date	07.08.2023
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