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

ITAT/119/2023
IA NO: GA/1/2023, GA/2/2023
PRINCIPAL COMMISSIONER OF INCOME TAX 1,KOLKATA
VS
M/S DOZCO INFRATECH PVT LTD

BEFORE :
THE HON'BLE THE CHIEF JUSTICE T.S. SIVAGNANAM
And
THE HON'BLE JUSTICE HIRANMAY BHATTACHARYYA
Date : 7th August, 2023

<u>*Appearance*</u> :
Mr. Tilak Mitra, Adv.
…for appellant
Mr. Amit Agarwala, Adv.
….for respondent

The Court : - We have heard Mr. Tilak Mitra, learned standing Counsel for the revenue/appellant and Mr. Amit Agarwala, learned Advocate for the respondent.

It appears there is a delay of 763 days in filing the appeal. Though the explanation offered for the appellant is not very convincing yet the appeal has been filed under Section 260A of the Income Tax Act, 1961, we are required to see as to whether any substantial question of law arises for consideration in this appeal. Therefore, we exercise discretion and condone the delay in filing the appeal. GA/1/2023 is allowed. Delay in filing the appeal is condoned.

This appeal filed by the revenue under Section 260A of the Income Tax Act, 1961 (the Act) is directed against the order passed by the Income Tax

Appellate Tribunal “A” Bench, Kolkata vide order dated 21.10.2020 passed in ITA/1438/Kol/2018 relating to Assessment Year 2010-2011.

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

“*WHETHER the Learned Tribunal has erred in law and infact by treating the excavators or bulldozers are motor vehicles and not plant and machinery and therefore allowed to claim depreciation at the rate of 15% instead of 30% inspite of the fact that Bothra Shipping Services Vs. CIT which has been upheld by the Hon’ble High Court at Calcutta vide its order dated 5th September, 2016 in ITAT no. 144 of 2015 does not say anything in favour of the assessee in categorical similar circumstances in the present appeal in hand* ?”

It may not be disputed by the revenue that the issue involved in the instant case is squarely covered against the revenue in the light of the decision of this Court *COMMISSIONER OF INCOME-TAX Vs. BOTHRA SHIPPING SERVICES,* [2023] 149 taxmann.com 461 (Calcutta). The operative portion of the judgment is reads as follows:-

“*The assessee was an appellant before the learned Tribunal challenging the order passed by the Commissioner of Income Tax, Kolkata dated 1.2.2010, passed under Section 263 of the Act. The assessee’s contention was that the earth moving vehicles fall under Entry 111(3)(ii) of part A of Appendix I of the Income Tax Rules 1962 and as such entitled to depreciation at 30% as allowable in case of motor lorries, since they were used in absence of running them on hire which was considered in the proper perspective by the assessing officer and the action of the CIT in restricting the depreciation at 15% is unlawful and could not have been done by invoking the power under Section 263 of the Act. The learned Tribunal had considered the factual position which was not in dispute; took note of the decisions* *of the Hon'ble Supreme Court in Bose Abraham Vs. State of Kerala, 2001 taxmann.com 1204/AIR 2001 SC 835 and the decision in the case of CIT vs. Gaylord Constructions (2010) 190 Taxman 406 (Kerala), Gujco Carriers Vs. CIT (2002) 122 Taxman 206 (Gujarat), Sanco Trans Ltd. Vs. Asstt. CIT (1997) 61 ITD 317 (Mad.), Gujarat Tube Well Co. Vs. ITO 1992 43 TT 331(Ahd) and Hindustan Construction Co. Vs. ITO (1989) 30 ITD 171 (Ahd.-Trib) and held that the assessing officer had correctly allowed the claim of depreciation under Section 32 of the Act, applying the rate of 30%. Thus we find that the learned Tribunal took note of the undisputed questions of fact and applied the judicial precedent and affirmed the order passed by the assessing officer."*

Following the above decision the appeal filed by the revenue is dismissed and the substantial questions of law are decided against the revenue.

(T.S. SIVAGNANAM)
CHIEF JUSTICE

(HIRANMAY BHATTACHARYYA, J.)

Pkd/GH.