

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

ITAT/251/2023
IA NO: GA/1/2022, GA/2/2023
PRINCIPAL COMMISSIONER OF INCOME TAX-2, KOLKATA
VS.
M/S. XL ENTERPRISE LTD.

BEFORE :
THE HON'BLE THE CHIEF JUSTICE T.S. SIVAGNANAM
And
THE HON'BLE JUSTICE HIRANMAY BHATTACHARYYA
Date : 13th December, 2023

Appearance :
Mr. Soumen Bhattacharjee, Adv.
...for appellant

Mr. Abhratosh Majumder, Sr. Adv.
Mr. Avra Mazumder, Adv.
Mr. Suman Bhowmick, Adv.
Mr. Kausheyo Roy, Adv.
Mr. Samrat Das, Adv.
...for respondent

The Court : This appeal by the revenue under Section 260A of the Income Tax Act, 1961 (the Act) is directed against the order dated 23rd March, 2023 passed by the Income Tax Appellate Tribunal, "C" Bench, Kolkata in ITA No. 2105/Kol/2019 for the assessment year 2012-13.

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

- i) Whether on the facts and circumstances of the case, the Hon'ble ITAT is right in holding that accumulated profit is required to be determined after

considering depreciation under the Income Tax Act, 1961 and not under the Companies Act, 1956 ?

- ii) Whether on the facts and circumstances of the case, the ITAT is right in not applying the ratio of the judgement in the case of P.K. Badiani v. CIT [1976] 105 ITR 642(SC) holding that accumulated profits means profits in the commercial sense and not assessable or taxable profit liable to be taxed under Income Tax Act ?

We have heard Mr. Soumen Bhattacharjee, learned standing Counsel appearing for the appellant and Mr. Abhratosh Majumder, learned senior Counsel appearing for the respondent/assessee.

There is a delay of 87 days in filing the instant appeal by the revenue. We are satisfied with the explanation offered by the appellant/revenue for not preferring the appeal within the period of limitation. Accordingly, the application for condonation of delay IA No: GA/1/2022 is allowed. Delay in filing the appeal is condoned.

The short question which falls for consideration in the instant case is whether the Tribunal was right in holding that the accumulated profit is required to be determined after considering depreciation under the Income Tax Act, 1961 and not under the Income Tax Act, 1956.

The learned standing Counsel for the appellant/revenue is right in his submission that such contention was not raised before the Commissioner of Appeals 4, Kolkata [CIT(A)] when the appeal was heard and disposed of by the CIT(A) by order dated 19th August, 2019. Nevertheless such a question was raised before the Tribunal and this being a question of law, the learned Tribunal rightly entertained the said question. Thus, the only issue which was considered

by the learned Tribunal was whether the argument of the assessee that accumulated profits as per the Companies Act are not the correct accumulated profits to be considered for the purpose of Section 2(22)(e) of the Act. The learned Tribunal placed reliance on the decision in the case of Commissioner of Income-tax vs. Pushparthy Packs (P.) Ltd., (2014) 42 taxmann.com 106 (Bombay) and the decision of the co-ordinate Bench of the Tribunal in the case of ACIT vs. Yasin Hotesl Pvt. Ltd. in ITA No. 1888/Mad/2007 ([2009] 121 TTJ 713 (Chennai)) and allowed the assessee's appeal. The contention raised in this appeal by the revenue is that the Tribunal ought to have applied the decision of the Hon'ble Supreme Court in P.K. Badiani vs. Commissioner of Income-Tax, Bombay, (1976) 105 ITR 642 (SC). In fact, identical argument was placed before the Court in the case of Pushparthy Packs (P.) Ltd. and the Court after taking note of the facts in the case of P.K. Badiani vs. Commissioner of Income-Tax, Bombay, (1976) 105 ITR 642 (SC) distinguished the same in the following terms :-

“3. The CIT(A) while considering the submissions on behalf of the Revenue, has found that while considering a taxable income of an Assessee, the Assessee is entitled to the depreciation as provided under the Income Tax Act. It has been found that while considering a case of an Assessee for assessment, it will be governed by the provisions as contained under the Income Tax Act. In so far as the Judgment in the case of P. K. Badiani (supra), is concerned, the question before the Apex Court was as to what would amount to accumulated profits. In the said case, the question that arose for consideration was as to whether the development rebate reserve created by the Company by charging the amount to the profit and loss account would be entitled to a deduction under the provisions of Section 2(6A) of the Income Tax Act. The Apex Court held that unless the accumulated profit is capitalised in some form or the other, mere transfer of the profits to any reserve account will not take away the character of such an amount from the ambit of

accumulated profits. It has been held that profits carried to reserve do not cease to be profits unless and until they are effectually capitalised. In the facts of the said case, the Apex Court found that though the part of the profit was transferred to the development rebate reserve account, the same was not capitalised by the Company and, as such, could not be taken away from the ambit of the definition “accumulated profits”.

4. The question that arises for consideration before this Court is somewhat different. The question that arises for consideration is as to whether the Assessee is entitled to claim depreciation while computing its taxable income as provided under the Income Tax Act or as provided under the Companies Act.

5. The law is no more res-integra. Various judgments including the ones in the case of Star Chemicals (P.) Ltd. v. CIT [1993] 203 ITR 11/[1994] 72 Taxman 279 (Bom) and CIT v. Jamnadas Khimji Kothari [1973] 92 ITR 105 (Bom), have held that the depreciation arising from the wear and tear of the business assets is a first charge on profits, without deducting which it is not possible to arrive at a profit in a year. It was held that the normal depreciation as provided under the Income Tax Act and not as per the one provided in the books of account, has to be taken into consideration while computing the Income Tax of an Assessee. In that view of the matter, it is a settled law that while assessing income, the Assessing Authority is required to take into consideration the depreciation as provided under the Income Tax Act and not as provided under the Companies Act.

6. In that view of the matter, we hold that the ratio of the judgment in the case of P.K. Badiani (supra), will not be applicable to the facts of the present case. The Appeal is, therefore, dismissed with no further orders as to costs.”

As noted in the above referred decisions as well as on the facts of the case on hand, the question for consideration is whether the assessee is entitled to claim depreciation while computing its taxable income as provided under the Income Tax Act or as provided under the Companies Act. This not being the question which fell for consideration in the case of P.K. Badiani, the learned Tribunal was fully justified in referring to and relying upon the decision in

Pushparthy Packs (P.) Ltd. Thus, we find that the Tribunal was right in allowing the assessee's appeal.

For the above reasons, the appeal filed by the revenue is dismissed and the substantial questions of law are answered against the revenue.

The stay application being IA: GA No. 2 of 2023 is also dismissed.

(T.S. SIVAGNANAM)
CHIEF JUSTICE

(HIRANMAY BHATTACHARYYA, J.)