Andreza

IN THE HIGH COURT OF BOMBAY AT GOA

TAX APPEAL NOS. 74 & 75 OF 2006

The Commissioner of Income Tax, Having office at Aayakar Bhavan, Patto Plaza, Panaji, Goa. ... Appellant

Versus

Alcon Resort Holding Limited, Velho Building, Panaji, Goa. ... Respondents.

Ms. Susan Linhares, Standing Counsel *for the Appellant.*

Mr. D. Pangam, Advocate *with Mr. S. Priolkar, Advocate for the Respondents.*

CORAM: M. S. KARNIK & VALMIKI SA MENEZES, JJ.

DATE: 17th MARCH 2023

JUDGMENT (*Per M. S. Karnik, J)*

1. These Appeals are disposed of by a common order as common issues are involved. Tax Appeal No. 74 of 2006 relate to the Assessment Year 1996-97. Tax Appeal No. 75/2006 relate to the Assessment Year 1995-96.

2. These Appeals were admitted on the following substantial question of law :

> "A. Whether in law and in the facts and in the circumstances of the case, the CIT(A) and the ITAT, were justified in admitting new evidence being the order dated 31/7/2001, issued by the Director General (Exemption), though the assessee had not made out a case for admitting new evidence under Rule 46A(1) of the Income Tax Rules, 1962."

3. The Appellant is aggrieved by the Judgment and Order dated 07.04.2006 passed by the Income Tax Appellate Tribunal, Panaji (ITAT, for short), dismissing the Appeals filed by the Department.

4. It is the case of the Department that the Respondent-Asessee set up a Tourism Resort in the State of Goa w.e.f. 06.12.1990. The Assessee has filed a return under Section 8(3) of the E.T. Act, in form No.3 of Expenditure Tax Rules, (E.T. Rules, for short) on 23.03.1998 declaring chargeable expenditure at Rs. 'Nil'. The notice under Section 9(1) was issued to the Assessee on 16.09.1998. The Assessee initially filed a statement of room charges exceeding Rs.1200/- per day charter-wise and as per that statement, the chargeable expenditure was Rs.2,25,117/- for the period from 12.12.1995 to 15.01.1996.

5. In response to the notice under Section 9(1), the Assessee filed a statement showing chargeable expenditure at Rs.1,35,54,270/- and tax at Rs.13,55,427/-. The statement of chargeable expenditure at Rs.1,92,56,720/- was filed on 31.01.2001. The Assessee contested that the E.T. Act is applicable where bed per day charges are exceeding Rs.1200/- excluding luxury tax and expenditure tax.

6. The Assessing Officer (*AO*, for short), did not accept the contention of the Assessee based on the decision of the High Court of Himachal Pradesh in the case of **"H. P. Tourism Development Corp. vs. UOI"** reported in **238 ITR 38**. The AO determined the chargeable expenditure of Rs.2,64,02,260/- and levied 10% tax unit at Rs.26,40,226/- and interest under Section 14 at Rs.23,85,031/-.

7. Aggrieved by the AO's Order, the Assessee filed Appeal before the Commissioner of Appeal. During the pendency of the Appeal challenging the AO's Order before the Commissioner of Appeal, the Assessee obtained a letter of Exemption from DG (IT) (Exemption), Kolkata vide Order dated 31.07.2001, whereby the Assessee was exempted under Section 80(IA)(4)(iii) of the IT Act from Expenditure Tax w.e.f. 06.12.1990 relevant to Assessment Year 1991-1992.

8. The CIT(A) by Order dated 23.04.2002, relying on the Order passed by the Director General (Exemption) Kolkata, dated 31.07.2001, which was produced before him for the first time, held that the Assessee is out of the mischief of Section 3 in view of the proviso to Section 4(a) of the ET Act.

9. The Department filed Appeal before the ITAT challeging CIT(A) Order on several grounds, inter alia, that the CIT(A) ought not to have admitted new evidence being Order dated 31.07.2001 and, secondly, that the approval was for only one Assessment year 1991-1992. The ITAT, by the impugned Order dated 07.04.2006, opined that the CIT(A) has rightly held that the Assesee is not liable to the charge of Expenditure Tax for the Assessment year in view of the Order dated 31.07.2001 issued by the DG (Exemption) read with proviso 4(a) of the E.T. Act.

10. Learned Counsel Ms. Susan Linhares, for the Department invited our attention to the provisions of Rule 46-A of the Income Tax Rules, 1962. It is submitted that none of the conditions entitling the Appellant to produce new evidence before the CIT(A) are satisfied. It is further submitted that the Tribunal ought to have considered that the Appellate Authority has admitted new evidence without recording any reasons for its admission, which is contrary to the mandate of sub-rule (2) of Rule 46-A of the IT Rules. A faint attempt was made by learned Counsel to make submissions on questions other than the substantial question of law on which this Appeal was admitted. In all fairness, such submissions were not pressed. The attempt was to persuade us that the exemption order had no bearing on the controversy, which according to the learned Counsel, renders the Orders passed by the

CIT(A) and the ITAT erroneous. However, learned Counsel urged that in the event the CIT(A) was of the opinion that the exemption Order dated 13.02.2001 has a bearing on the controversy, then the matter ought to have been remanded to the AO to deal with the exemption Order in the first instance, instead of CIT(A) directly considering the document for the first time in Appeal.

11. Learned Counsel Shri Pangam, appearing on behalf of the Respondent-Assessee argued in support of the impugned Order. It is submitted that there are concurrent orders passed by the CIT(A) & the ITAT which are in consonance with the provisions of Rule 46-A of the Rules and hence the impugned orders do not warrant any interference. It is further submitted that what is being claimed by the Assessee is the benefit of exemption order dated 31.07.2001 in terms of the provisions of Sections 80-IA(5)(ii) and 80-IA(1)(iii) read with Rules 18BBC of the Income Tax Act, 1962 approved for the purpose of the said Section w.e.f. 06.12.1990. The exemption Order came to be passed after the Order of the AO. The Appellant produced the said exemption Order before CIT(A) who was already seized with the matter. Learned Counsel submitted that the view taken by the ITAT cannot be said to be perverse so as to warrant interference in the exercise of writ jurisdiction.

12. Heard learned Counsel for the parties. Perused the Memo of the Petition, the impugned Order and the documents enclosed along with the paper-book.

13. The Assessment Order for the Assessment Year 1996-97 was made on 13.02.2001 by the AO under Section 9(2) of the E.T. Act. During the pendency of the Appeal before the CIT(A) in its challenge to the Assessment Order, the exemption order dated 31.07.2001 was made by the Director General of Income Tax(E) Kolkata on 31.07.2001 in terms of the provisions of Section 80-IA(5)(ii) and 80-IA(1)(iii) read with Rules 18BBC of the Income Tax Act, 1962. CIT(A) admitted the exemption Order in evidence entitling the Assessee the benefit of such order. ITAT confirmed the view taken by CIT(A). In the light of the substantial question of law as framed by this Court, the only aspect that needs to be considered is whether the CIT(A) was justified in admitting new evidence being the exemption Order dated 31.07.2001 and whether such admission of new evidence satisfied the requirements of Rule 46-A(1) of the Income Tax Rules, 1962.

14. The exemption Order dated 31.07.2001 was passed after the Assessment Order came to be made by the AO. During the pendency of the Appeal before the CIT(A), the Appellant requested that such exemption Order dated 31.07.2001 be taken into consideration in support of the Appellant's case. The exemption Order was the additional evidence. At this juncture, it is pertinent to re-produce Section 46-A of the IT Rules. The same reads thus :

> "[Production of additional evidence before the Deputy Commissioner (Appeals)] [and Commissioner (Appeals)].
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> 46-A(1) The appellant shall not be entitled to produce before the [Deputy Commissioner (Appeals)] [or, as the case may be, the Commissioner (Appeals)], any evidence, whether oral or documentary, other than the evidence produced by him during the course of proceedings before the Assessing Officer], except in the following circumstances, namely :—
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> a) where the[Assessing Officer] has refused to admit evidence which ought to have been admitted ; or
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> b) where the appellant was prevented by sufficient cause from producing the evidence which he was called upon to produce by the [Assessing Officer]; or
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> c) where the appellant was prevented by sufficient cause from producing before the[Assessing Officer] any evidence which is relevant to any ground of appeal; or
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> d) where the[Assessing Officer] has made the order appealed against without giving sufficient opportunity to the appellant to adduce evidence relevant to any ground of appeal.
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> (2) No evidence shall be admitted under sub-rule (1) unless the [Deputy Commissioner (Appeals)] [or, as the case may be, the Commissioner (Appeals)] records in writing the reasons for its admission.
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> (3) The [Deputy Commissioner (Appeals)][or, as the case may be, the Commissioner (Appeals)] shall not take into account any evidence produced under sub-rule (1) unless the [Assessing Officer] has been allowed a reasonable opportunity—
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> a) to examine the evidence or document or to cross-examine the witness produced by the appellant, or
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> b) to produce any evidence or document or any witness in

rebuttal of the additional evidence produced by the appellant.

(4) Nothing contained in this rule shall affect the power of the [Deputy Commissioner (Appeals)] [or, as the case may be, the Commissioner (Appeals)] to direct the production of any document, or the examination of any witness, to enable him to dispose of the appeal, or for any other substantial cause including the enhancement of the assessment or penalty (whether on his own motion or on the request of the [Assessing Officer]) under clause (*a*) of sub-section (1) of section 251 or the imposition of penalty under section 271."

15. Reading of Rule 46-A indicates that additional evidence can be admitted by the CIT(A) subject however to the satisfaction of the conditions mentioned in Rule 46-A(1)(c). The fact that an exemption Order dated 31.07.2001 referred to above was issued is not in dispute. The exemption Order enures to the benefit of the Assessee. The findings of the CIT(A) reveals that the CIT(A) was conscious of the provisions of Rule 46-A(1)(c) of the IT Rules. It is observed by him that the exemption Order dated 31.07.2001 is admitted under Rule 46-A(1)(c) of the IT Rules as it goes to the very root of the grounds of appeal i.e. the charge of Expenditure Tax in the Assessee's case. CIT(A) held that as a result of the exemption Order, the Assessee's case is taken out of the mischief of Section 3 by first proviso to Section 4(a) of the E.T. Act and hence the Assessee is not liable to be charged of E.T. for Assessment of years under appeal.

16. It is further pertinent to mention that even the Tribunal has observed that upon issuance of the exemption Order, what was expected by the AO was done by the First Appellate Authority. The Tribunal observed that the validity of the exemption letter is not disputed. The Tribunal has thus held that the CIT(A) has rightly implemented the Order of the Director General (Exemption).

17. We see no reason to interfere with the view taken by the Tribunal. After the issuance of the exemption Order, even if the matter were to be remanded to the AO for giving effect to the exemption Order, the same consequence as the order passed by the CIT(A) would have ensued. CIT(A) remitting the matter back to the AO would have been an empty formality. In any case, the exemption Order was passed after the Assessment Order was made by the AO. The AO may be justified in taking the view in the absence of the exemption Order. Nonetheless, so long as the exemption Order is passed by the Director General of Income Tax (E) Kolkata stands, the same has to be given effect to. The CIT(A), upon production of the exemption Order, the validity of which is not under dispute, proceeded to give effect to the said Order and, accordingly allowed the Appeal. Rule 46-A empowers the CIT(A) to admit new evidence subject to the conditions stipulated therein.

18. If in the facts of the present case, the CIT(A) was of the opinion that the Assessee was prevented from sufficient cause in producing the exemption Order before the AO which is relevant to any ground of appeal, we do not find error with this approach adopted by the CIT(A). The exemption Order was made only after the Order of the AO.

19. We also do not find any merit in the contention of the learned Counsel for the Appellant that CIT(A) has not recorded reasons in writing for admission of new evidence. The CIT(A) has recorded that as a result of the exemption Order, the Appellant has been taken out of the mischief of Section 3 by the first proviso to Section 4 of the E.T. Act and, therefore, the Appellant is not liable to be charged for E.T. for Assessment years under appeal. In any case, sub-rule(4) of Rule 46-A starts with an obstante clause empowering the CIT(A) to direct the examination of any witness and production of any document to enable him to dispose of the appeal. The exercise of power by the CIT(A) in allowing admission of the exemption Order in support of the Appellant's case, cannot be said to be arbitrary or perverse exercise to warrant interference. The CIT(A) having held that the additional evidence in the form of order of exemption, goes to the very root of the ground of Appeal i.e. the charge of the E.T. in the Assessee's case, the CIT(A) was justified in its approach in admitting such exemption Order while allowing the Appeal. The requirements for admitting additional evidence stands satisfied. The ITAT having confirmed the view taken by the CIT(A), we find no reason to interfere with the concurrent findings recorded by the CIT(A) and the ITAT.

20. The Appeals are dismissed. No costs.

VALMIKI SA MENEZES, J. **M. S. KARNIK, J.**

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