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TCA.No.842 of 2010

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved On	01.11.2022
Pronounced On	09.01.2023

CORAM:

THE HONOURABLE MR.JUSTICE S.VAIDYANATHAN
and
THE HONOURABLE MR.JUSTICE C.SARAVANAN

TCA.No.842 of 2010

M/s.Lakshmi Machine Works Limited,
Perianaickenpalayam,
Coimbatore – 641 020.

... Appellant / Respondent

vs.

The Assistant Commissioner of Income Tax,
Company Circle IV (2),
Race Course Road,
Coimbatore.

... Respondent / Appellant

Prayer: Appeal under Section 260A of the Income Tax Act, 1961, against the order of the Income Tax Appellate Tribunal, “A” Bench, Chennai dated 27th March 2009 in ITA.No.737/Mds/2007.

For Appellant : Mr.R.Vijayaraghavan
for M/s.Subbaraya Aiyar Padmanabhan

For Respondent : Mr.M.Swaminathan
for M/s.V.Pushpa
Senior Standing Counsel



TCA.No.842 of 2010

WEB COPY

JUDGMENT

S.VAIDYANATHAN, J.

AND

C.SARAVANAN, J.

This Appeal was admitted on 29.09.2010. On 01.11.2022, another substantial question of law was framed. Thus, the following substantial questions of law were framed for being answered in this appeal:-

- i. Whether the reopening of the assessment under Section 147 on the basis of the material already available on record, which was duly considered during the assessment proceedings under Section 143(3) and also in the proceedings under Section 154 dated 29.01.2001, would amount to mere change of opinion and invalid?
- ii. Whether on the facts and in the circumstances of the case, the Tribunal was right in disallowing the unabsorbed depreciation of the amalgamating company applying the provisions of clause (iii) of Explanation to Section 115JA of the Act?
- iii. Whether in the absence of any formation of opinion regarding business loss and unabsorbed depreciation in the original assessment order under Section 143(1) of Income Tax Act, 1961 on 09.05.2002 would entitle the Income Tax Department to reopen the assessment under Section 148 r/w 147 of Income Tax Act, 1961?



TCA.No.842 of 2010

WEB COPY

2. This Tax Case Appeal has been filed by the Assessee against order dated 27.03.2009 passed by the Income Tax Appellate Tribunal, Chennai “A” Bench, in I.T.A.No.737/Mds/2007. By the impugned order, the Appellate Tribunal has dismissed the appellant’s appeal against Order dated 3.1.2007 of the Appellate Commissioner in Appeal No.436/05-06.

3. Relevant and the operative position of the impugned order of the Appellate Tribunal reads as under:-

16. We have considered the rival submissions in the light of material on record and the precedent cited. The CIT(A) has noted in paragraph 4.1 of his order that a company M/s.IPBM having accumulated loss of Rs.1,55,13,974/- and unabsorbed depreciation of Rs.2,52,32,324/- amalgamated with the assessee-company on 01.04.1999.

17. The sub-section (1) of section 72A, as amended by the Finance Act, 2000 w.e.f. 01.04.2000, says that in the case of amalgamation of a company, owning and industrial undertaking, with another company, the accumulated loss and the unabsorbed depreciation of the amalgamating company shall be deemed to be the loss/depreciation of the amalgamated company for the previous year in which the amalgamation takes place. It reads as under:-

“(1) Where there has been an amalgamation of a company owning an industrial undertaking or a ship with another company, then, notwithstanding anything contained in any other provision of this Act, the accumulated loss and the unabsorbed depreciation of the amalgamating company shall be



WEB COPY



TCA.No.842 of 2010

deemed to be the loss or, as the case may be, allowance for depreciation of the amalgamated company for the previous year in which the amalgamation was effected, and other provisions of this Act, relating to set off and carry forward of loss and allowance for depreciation shall apply accordingly.”

18. The AO, while computing the book profit of the assessee-company u/s.115JA (1) applied the provisions of clause(iii) of Explanation to this section. It reads as under:-

Explanation—For the purpose of this section, “ book profit”, means the net profit as shown in the profit and loss account for the relevant previous year prepared under sub-section (2), as increased by-

If any amount referred to in clauses(a) to (f) is debited to the profit and loss account, and as reduced by,-

(iii) the amount of loss brought forward or unabsorbed depreciation, whichever is less as per books of account.

19. Since the loss was of Rs.1,55,13,974/- and the unabsorbed depreciation was of Rs.2,52,32,324/-, the AO, reduced the ‘net profit’ as shown in the profit and loss account by Rs.1,55,13,974/- in terms of clause(iii) of Explanation to Section 115JA(1). The objection of the Id.AR of the assessee as reproduced in para 5.2 of his order is as under:-

“ As already explained, this matter has been duly examined in the course of proceedings u/s 154 dated 29.01.2001 and the claim has been found to be in order. The Company IPBM, was merged with the appellant Company, only with effect from 1.4.99 and the loss of IPBM was written off in the Books of



account of the Company, as a result of the merger with the appellant company. The break up of Rs.1,55,13,974/- towards business loss and books of account of the appellant as on 31.03.1999 as IPBM was an Books of the appellant company.

Clause(iii) of sub-section (2) of section 115JA is applicable only to the amount of loss and unabsorbed depreciation, whichever is lower, as per the books of account of the assessee company. Since this amount of loss or depreciation was not brought forward as per the books of account of the appellant company, as on 31.03.1999, the Assessing Officer is clearly wrong in making an addition to the extent of Rs.2,52,32,329/- by relying on section 115JA(20)(iii).

20. The above argument was rejected by the CIT(A) and we see no infirmity in the order. The language of section 72A(1) and of clause(iii) of Explanation to section 115JA(1), as reproduced above, are unambiguous and leave no scope for doubt. The admitted facts in the present case are that the assessee-company had loss brought forward as well as unabsorbed depreciation and therefore, applicability of clause(iii) of the said Explanation cannot be avoided. This issue is squarely covered against the assessee by the ruling of the Authority for Advance Ruling in the case of RashtriyaIspat Nigam Ltd. (2006)285 ITR1 (AAR). In that case the Authority ruled as under(Headnotes)

iv) That, since the applicant had disclosed the aggregate loss comprising loss brought forward and unabsorbed depreciation as a consolidated figure in its profit and loss account, the applicant was required to bifurcate such consolidated loss into loss brought forward and unabsorbed depreciation for the purpose of calculating the book profit under Section 115JB. The applicant could not avail of the



WEB COPY



TCA.No.842 of 2010

benefit of reduction envisaged under Section 115JB in a manner different from the one prescribed under the Act so as to be more beneficial to the applicant’.

(v) Sub-clause (iii) of both section 115JA and section 115JB left no room for doubt that the expression “ loss brought forward” does not include depreciation and the net profit of the current year is to be reduced by the lesser of the two.....”.

21. In the case of Rashtriya Ispat Nigam Ltd., (supra), it was held by the Authority for Advance Ruling that the accounts prepared under the Companies Act must be modified, wherever necessary , to comply with the provisions of section 115JA of the Act, for the computation of minimum alternative tax. This is precisely what the AO did in this case. Therefore, we see no reason to interfere with the order of the CIT(A). The grounds No.3 to be are accordingly, rejected.

22. In the result, the appeal filed by the assessee is dismissed.

4. The Appellate Commissioner had earlier dismissed Appeal No.436/05-06 of the appellant against Assessment Order dated 08.02.2006 for the assessment year 2000-2001 for the relevant previous year 1999-2000. Relevant portion of the Order dated 03.01.2007 of the Appellate Commissioner in Appeal No.436/05-06 reads as under:-



WEB COPY



TCA.No.842 of 2010

1. Validity of assessment proceedings initiated under section.147 of the I.T.Act, 1961

“4.1.....

4.2. *I have carefully considered the submissions of the appellant and the Id.AR and the action of the Assessing Officer on the issue. This issue has been contested by the appellant and the Id.AR on the ground that the computation of book profits u/s.115JA was merged with the CIT(A)-I's order dated 22.03.2005 and hence the Assessing Officer's action in initiating the proceedings u/s.147 of the I.T.Act,1961 to reopening the assessment earlier completed u/s.143(3) is to be held invalid. After due considering of the appellant's submissions, I am of the view that it has misconceived the facts. The directions of the CIT(A)-I, Coimbatore in his order dated 22.03.2005 was only consequential in nature to alter the Calculation of 115JA while giving effect to his orders in the original calculation of regular profits. The issue now under consideration was never dealt with at the time of original assessment of the following appellate stage. **In view of this, it can be clearly said that no opinion was cannot be any change of opinion on these issues. In view of this, I hold that the reassessment proceedings initiated u/s.147 of the Act, 1961 followed by issue of notice u/s.148 on 30.04.2004 to be valid and consequently the assessment order passed u/s.143(3) r.w.sec.147 of the Act, dated 08.02.2006 for A.Y.2000-01 which is the subject matter of this appeal, to be a order valid in law.***

5. Disallowance of unabsorbed loss and Depreciation of the amalgamated company (viz) IPBM to the extent of Rs.2,52,32,324/-

5.1.

5.2.



WEB COPY



TCA.No.842 of 2010

5.3. *I carefully considered the finding of the Assessing Officer submissions of the Id.AR and the appellant on this issue. The appellant's claim is basically that the entire loss of Rs.4,07,46,298/- (comprising business loss of Rs.1,55,13,974/- and unabsorbed depreciation of Rs.2,52,32,324/-) should have been reduced from the "book profits" computed u/s.115JA as claimed by it in the return of income for A.Y.2000-01, the Assessing Officer apply the provisions of clause (iii) of Explanation to Section 115JA has allowed only set off of business losses of Rs.1,55,32,324/- as only business loss or unabsorbed depreciation, whichever is least is alone allowable as a deduction. The appellant company however contends that no such bifurcation is available in their books of account and as far as they are concerned, the entire losses of M/s.IPBM on amalgamation with the appellant on 01.04.1999, have been transferred to their books by a single entry. The contention and submissions of the appellant have been duly considered and are not acceptable for the simple reason that even without amalgamation etc., in no company's books the said bifurcation is made. Both the business loss/unabsorbed depreciation are shown together under the head profits and loss or miscellaneous expenses or in some cases by adjusting it current years profit or reserves or surpluses. The break up is available only in the tax computation sheets in the return of income and schedules. So merely because no bifurcation was made in the books will not absolve the tax liability or the computation of "book profits". Section 72A of the I.T.Act, 1961 which deals with the carry forward and set off of unabsorbed losses and depreciation, clearly distinguish losses and depreciation. These items never lose their character and this distinction cannot be done away with making any book entry as the appellant has sought to do. In view of the*



WEB COPY



TCA.No.842 of 2010

discussion above, I am of the considered view and hold that the Assessing Officer's action on this issue to be correct and in order and I uphold and sustain the same."

5. On behalf of the appellant, relied on the following decisions:-

- i. **TANMAC India vs. Deputy Commissioner of Income Tax**, (2016) 97 CCH 0189 ChenHC;
- ii. **Commissioner of Income Tax vs. Ashley Services Limited**, (2014) 369 ITR 0209(Mad);
- iii. **Commissioner of Income Tax-VI vs. Usha International Limited**, (2012) 348 ITR 0485;
- iv. **Apollo Tyres Ltd vs. Commissioner of Income Tax**, (2002) 255 ITR 0273;
- v. **Commissioner of Income Tax vs. HCL Comnet Systems & Services Ltd.**, (2008) 305 ITR 0409;
- vi. **Sri Hariram Hotels (P) Ltd vs. Commissioner of Income Tax III** , (2016) 237 Taxman 0564;
- vii. **Commissioner of Income Tax vs. Bisleri Sales Ltd.**, (2015)377 ITR 0144 (Bom);
- viii. **Tamil Nadu Cements Corporation Ltd vs. Joint Commissioner of Income Tax**, (2012) 349 ITR 0058;
- ix. **Commissioner of Income Tax vs. Echjay Forgings (P) Ltd.**, (2001) 251 ITR 0015;



TCA.No.842 of 2010

6. The learned counsel for the appellant submits that notice was issued on 07.05.2004 even before the CIT(A) had passed the order in the appeal against the original Assessment Order. The reason for reopening was computation of relief under Section 80 HHC. As this was subject matter of appeal, the issue merged with the order of the CIT(A) and cannot be reopened.

7. In the original assessment, the income under the normal provisions were assessed as the total income and not the Bank profits. Hence there can be no escapement of income at the time of notice under Section 148 was issued unless total income was assessed under Section 115 JA.

8. The learned counsel further submits that in the present case, loss of amalgamating company has been debited to the P & L of the Company. The Profit and Loss prepared by the appellant was in accordance with the provisions of Parts II and III of Schedule VI.

9. It has been approved by the shareholders and filed with the registrar of Companies who had not objected to the same. None of the explanation to Section 115JA required adding back of the loss and depreciation relating to prior years should be added back. Therefore, the Book Profits as per Books should be adopted.



TCA.No.842 of 2010

10. The lower authorities were under the mistaken impression that the Assessee claimed deduction of loss of the Amalgamating Company under Explanation (iii) to Section 115JA. Explanation (iii) pertains to loss carried forward in the Books which is to be adjusted after the initial computation of Profit/Loss in accordance with Schedule VI. But in the present case, the deduction has been claimed in the computation of profits computed as per Schedule VI to the Companies Act and therefore further adjustment as per Explanation (iii) does not apply.

11. The learned standing counsel for the respondent defends the impugned order and relied on the following decisions:

- i. **Export Credit Guarantee Corporation of India Limited vs. Additional Commissioner of Income Tax**, (2013) 30 taxmann.com 211 (Bombay);
- ii. **Commissioner of Income Tax vs. Kelvinator of India Limited**, (2010) 320 ITR 0561; (2010) 187 TAXMAN 0312;

12. The learned counsel for the respondent defends the impugned order and submits that no substantial question of law arises for consideration in this appeal. It is submitted that the order of the appellate Tribunal confirming the order of the appellate Commissioner and that of the assessing officer dated 08.02.2006 passed under section 143 (3) read with section 147 of the income tax act was well reasoned and requires no interference.



TCA.No.842 of 2010

13. It is submitted that appellant had made a wrong declaration based on which the assessment was reopened management as the appellant has higher deduction.

14. We have considered the arguments advanced by the learned counsel for the appellant and the respondents.

15. Brief facts of the present case are that a company named M/s.India Precision Bearing Mfrs. Limited (herein after referred to as IPBM Limited)merged with the appellant with effect from 1.4.1999.

16. The book profit of the appellant as per the Income Tax Return tiled under Section 139 of the Income Tax Act, 1961 was Rs.18,93,68,237/-.

17. The said company M/s. IPBM Limited which stood amalgamated with appellant had an accumulated loss of Rs.5,62,77,825/- as is evident from a reading of the Order dated 29.1.200 passed under Section 154 of the Income Tax Act, 1961.

18. The book profit of the appellant was arrived by adding the accumulated loss of Rs.5,62,77,825/- of IPBM Limited to the book profit of the appellant of Rs.18,93,68,237/-to arrive at Rs.24,56,77,825/- [Rs.18,93,68,237+ Rs.5,62,77,825].



TCA.No.842 of 2010

19. From the aforesaid amount of Rs.24,56,77,825/- [Rs.18,93,68,237+ Rs.5,62,77,825], an amount of **Rs.4,07,46,303/-** was deducted as Loss of IPBM Limited charged to the P&L Account.

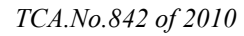
20. However, a reading of the records filed, indicate that the break of **Rs.4,07,46,303/-** represents an amount of **Rs.2,52,32,329/-** of unabsorbed depreciation of the said IPBM Limited and **Rs.1,55,13,974/-**, the accumulated loss of the said company.

21. Section 72 A of the Income Tax Act, 1961 was amended by the Finance Act, 2000 with effect from 1.4.2000. It uses the expression “notwithstanding anything contained in any other provisions of this Act”.

22. As per Section 72 A of the Income Tax Act, 1961 as amended by the Finance Act, 2000 with effect from 1.4.2000, in the case of amalgamation of a company owning:-

- i. an industrial undertaking; or
- ii. a ship;

with another company, then, notwithstanding anything contained in any other provision of the Act the accumulated loss and the unabsorbed depreciation of the amalgamating company shall be deemed to be the loss or unabsorbed depreciation of as the case may be, allowance for depreciation of the amalgamated company for the previous year in which the amalgamation was affected and other provisions of this Act, relating to set off and carry forward of loss and allowance for depreciation shall apply accordingly.



24. As per clause (iii) of Explanation to Section 115JA (1) “book profit” means net profit as shown in the “profit and loss account” for the relevant previous year retired under sub-section (2). Thus, the appellant could reduce the book profit **as increased by the amount of loss brought forward or unabsorbed depreciation, whichever is less as per the books of account.**

26. The appellant could reduce only a sum of **Rs.1,55,13,974/-** being the unabsorbed loss and not the unabsorbed depreciation of **Rs.2,52,32,329/-** as on 31.03.1999. The appellant claimed both as a deduction.

27. In the return of income filed by the appellant under Section 139 of the Income Tax Act, 1961 on 29.11.2000 for the Assessment Year 2000-200, the appellant admitted a total income of **Rs.2,61,06,725/-** only



TCA.No.842 of 2010

and the book profit of **Rs.5,68,10,471/-** under Section 115JA. It was accepted under Section 143(1) intimation.

28. Subsequently, a notice under Section 154 of the Income Tax Act, 1961 was issued to the appellant. The aforesaid notice culminated in an order dated 29.01.2001 under Section 154 of the Act.

29. One of the issue pertained to deduction claimed on unabsorbed loss of **Rs.5,62,77,588/-** from the net profit to arrive as the book profit. While passing order dated 29.01.2001 under Section 154 of the Act, the Additional Commissioner Of Income Tax accepted the reply of the appellant. The book profit was re-computed and the taxable income was marginally increased to **Rs.5,81,69,850/-**. This was an erroneous determination.

30. Meanwhile, the case was selected for scrutiny after issue of notice under Section 143(2) of the Income Tax Act, 1961 on 23.11.2001. An Assessment order was passed under Section 143(3) of the Income Tax Act, 1961 on 09.05.2002. Thereafter, a notice dated 30.04.2004, under Section 148 of the Income tax was issued.

31. It appears that, an appeal was also filed pursuant to order of the assessing officer in Appeal No. 180/2002-03 before the Appellate Commissioner which culminated in an order dated 22.3.2005 of the Appellate Commissioner. However, copy of order dated 22.3.2005 passed by the Appellate Commissioner in Appeal No. 180/2002-03 is not available.



TCA.No.842 of 2010

32. The Deputy Commissioner of Income Tax in his proceedings dated 3.5.2005 also gave effect to order dated 22.3.2005 of the appellate Commissioner in Appeal No. 180/2002-03. However, there is a reference to it order dated 03.01.2007 of the Appellate Commissioner.

33. A revised assessment order dated 08.02.2006 was passed under Section 143(3) r/w 147 of the Income Tax Act, 1961. The total income of the appellant was assessed at Rs.5,52,14,264 and the profit under 115JA at Rs.703,84,722/-.

34. Being aggrieved by the re-assessment order dated 08.02.2006, the Appellant preferred I.T.A.No.436 of 2005, before the Commissioner of Income Tax (Appeals-I) [hereinafter referred to as the Appellate Commissioner for the sake of brevity].

35. The Appellate Commissioner dismissed I.T.A.No.436 of 2005, vide Order dated 03.01.2007, and thus, confirmed the Assessment Order dated 08.02.2006 passed by the Assessing Officer.

36. Aggrieved by the same, the appellant filed further appeal before the Income Tax Appellate Tribunal in I.T.A.No.737/Mds/2007. The said appeal was dismissed by the Tribunal by order dated 27.03.2007, on the ground that the Appellant/Company had brought both forward loss as well as unabsorbed depreciation contrary to clause (iii) to Explanation to Section 115JA(1) of the Income Tax Act, 1961. As against the said order, the present Appeal has been filed.



TCA.No.842 of 2010

37. The computation taxable income for the purpose of Section 115 JA of the Income Tax Act, 1961 was made erroneously by the Appellant claiming higher deduction of amount Rs.4,07,46,303/- instead of Rs.1,55,13,974/- being the unabsorbed loss by window dressing the returns filed under Section 138 of the Income Tax Act, 1961. Thus, the assessment that was completed improper.

38. Instead of **Rs.7,27,81,487/-** as the taxable income was determined contrary to Section 115 JA (1) explanation (iii) read with Section 72A(1) of the Income Tax Act, 1961, as amended by the Finance Act, 2000, the taxable income was wrongly computed.

39. The appellant company being governed by Section 115JA of the Income Tax Act, 1961, the appellant was entitled to reduce the taxable income only in terms of explanation to sub-section(2) Clause (iii) of Section 115JA of the Income Tax Act, 1961.

40. The appellant was entitled for the reduction of the amount of loss brought forward or unabsorbed depreciation, which ever was less as per the books of account. As per the above Explanation to Section 115JA of the Income Tax Act, 1961, the appellant could reduce the income only by Rs.1,55,13,974/- only from the loss brought forward. However, in the returns filed by the appellant, the appellant had reduced both the amount namely the loss brought forward and the unabsorbed depreciation.



TCA.No.842 of 2010

41. The appellant had mislead the Department regarding the deduction available under Section 115 JA of the Income Tax Act, 1961 which was sought to be rectified by invoking under Section 148 for the purpose of Section 147 r/w 143(3) of the Income Tax Act, 1961.

42. In case, Assessing Officer found a cause or justification to believe that income had escaped assessment. The Assessing Officer was not required to base his belief on any final adjudication of the matter.

43. The Commissioner of Income Tax (Appeals) vide dated 03.01.2007 in Appeal No.436/2005-2006, has stated that the directions of the CIT (A)-1, Coimbatore in his order dated 22.03.2005 was only consequential in nature to alter the Calculation of 115 JA while giving effect to his orders in the original calculation of regular profits.

44. The return that was filed was not a proper return. The returns that was filed, had incorrect entries and contrary to the mandate of Section 115JA of the Income Tax Act, 1961. While in taxing matters assessment are intended to bring a finality, they are not to be continued, if the returns filed were inspired within a view to cheat the Government.

45. Therefore, the decision cited in the case of **Commissioner of Income Tax vs. Kelvinator of India Limited**, and other decisions cannot be applied to the facts of the present case. As invocation of power under Section 147 r/w 143 of the Income Tax Act, 1961 was not motivated any kind of change of opinion.



TCA.No.842 of 2010

46. The impugned order of the Appellate Tribunal correctly holds that the power to make assessment or reassessment, where the initiation has been made within four years of the end of the relevant assessment year, would be attracted even in cases where there has been a complete disclosure of all relevant facts upon which a correct assessment might have been based in the first instance and whether it is an error of fact of law that has been discovered or found out justifying the belief required to initiate the proceedings. In this case, the appellant has resorted to deception and hoodwinking the revenue to evade tax.

47. The words ‘reason to believe’ appearing in Section 147 cannot mean that the A.O should have finally ascertained the facts. Assessing Officer merely forms a ‘belief’ from the examination he makes and if escaped assessment, it would amount to saying that he has ‘reason to believe’ that such income has ‘escaped assessment’. The justification for his belief is not to be judged from the standards of proof required for coming to a final decision.

48. This issue was never dealt with at the time of original assessment or at the appellate stage. It cannot be said that there was any change of opinion and therefore the proceeding initiated under Section 147 of the Act, 1961, by issuing of notice under Section 148 on 30.04.2004 was invalid to nullify the assessment order dated 08.02.2006 passed under Section 143(3) r/w Section 147 of the Act dated for the Assessment Year 2000-2001. We are therefore of the view that the substantial questions of law is to be answered against the appellant.



TCA.No.842 of 2010

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49. The order dated 08.02.2006, passed by the Assessing Officer does not suffer from any infirmity. Therefore, the impugned order dated 27.03.2009 of the Appellate Tribunal in I.T.A.No.737/Mds/2007, affirming the order dated 03.01.2007 of the Appellate Commissioner in Appeal No.436/2005-2006 cannot be disturbed. Therefore, the appeal is liable to be dismissed.

50. We are therefore inclined to dismiss this appeal. Accordingly, the appeal stands dismissed. No costs.

[S.V.N., J.]

[C.S.N., J.]

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TCA.No.842 of 2010

To:-

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Coimbatore.



WEB COPY



TCA.No.842 of 2010

S.VAIDYANATHAN, J.
and
C.SARAVANAN, J.

kcd/rgm

Pre-Delivery Judgment in
TCA.No.842 of 2010

09.01.2023