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IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 06.08.2024

CORAM :

**THE HONOURABLE DR.JUSTICE ANITA SUMANTH
and
THE HONOURABLE MR.JUSTICE G. ARUL MURUGAN**

T.C(Appeal).No.1985 of 2008

M/s.V.G.Panneerdas & Co.,
V.G.P. Square, Saidapet,
Chennai 600 015.

.. Appellant

VS

The Assistant Commissioner of Income Tax,
Circle V,
121, Nungambakkam High Road,
Chennai – 600 034.

.. Respondent

Appeal filed under Section 260A of the Income Tax Act, 1961
against the order of the Income Tax Appellate Tribunal, “C” Bench,
Chennai dated 25.7.2008 in I.T.A.No.1561/MDS/2002 for the
assessment year 1995-96.

For Petitioner : Mr.A.S.Sriraman
for Mr.S.Sridhar

For Respondent : Ms.V.Pushpa
Senior Panel Counsel
assisted by
Ms.Anu Ganesan,
Junior Panel Counsel



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JUDGMENT

(Delivered by DR.ANITA SUMANTH.,J)

This appeal has been admitted on the following two substantial questions of law:

'1.Whether the Appellate Tribunal is correct in law in sustaining the action of the CIT in passing the revision order in terms of Section 263 of the Act even though there was a failure on his part to establish and demonstrate the fulfilment of the twin conditions of error and prejudice causing to the revenue at the time of issuing show cause notice as well as in the passing of the revision order?

2.Whether on the facts and circumstances of the case the Tribunal is right in dismissing the appeal despite the fact that on an earlier occasion in ITA.Nos.659 and 660 of 2003 for the assessment years 1993-94 and 1994-95, the Tribunal has granted the relief of depreciation in favour of the assessee and thus modified the assessment order which form the basis for passing the present order?'

2.The appeal relates to Assessment Year (AY) 1995-96 and the

substantial questions of law as above, arise from an order of the Income Tax Appellate Tribunal ('Tribunal'/ITAT) dated 25.07.2008. Pursuant to a return of income filed on 31.10.1995/03.03.2000, returning a loss of Rs.4,90,13,596/- the petitioner received an order of re-assessment dated 28.03.2002, reducing the loss returned by it. A perusal of that order reveals that though there are several dis-allowances effected, there is no



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discussion on the aspect of depreciation and the claim of the assessee in that regard has not been disturbed.

3.A show cause notice came to be issued on 20.03.2002 by the Commissioner of Income Tax, who was of the view that the order of assessment was both erroneous and prejudicial to the interests of Revenue. The appellant responded to the proposal objecting to the same, despite which an order came to be passed u/s 263 of the Act. The Appellant carried the order by way of appeal to the Tribunal which, by way of the impugned order dated 25.07.2008 rejected the same.

4.The basis of the proposed suo moto intervention u/s 263 of the Act is the claim of depreciation by the petitioner. Admittedly, the business of the Appellant comprises two divisions, i.e. Land Division and Retail Business Division. Depreciation was claimed in respect of both the divisions. For AY 1993-94 and 1994-95 the profit of the Retail Business was estimated as the petitioner had been unable to provide direct evidence in support of the profit disclosed.

5.The profit was hence re-cast and in doing so, the Assessing Authority appears to have rendered a finding that the business of the Land Division was very nominal when compared to the scale of the Retail



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Business. He has also incidentally observed that the house and other assets were not required for the business of the Land Division.

6. Based on the aforesaid incidental observations, a portion of the depreciation was disallowed. According to the Appellant, the disallowance travelled to the Tribunal by way of Income Tax Appeals in ITA.Nos.659 & 650 of 2003 and the issue has been answered in its favour. Unfortunately, neither party is in a position to produce a copy of that order.

7. However, the petitioner has filed a copy of a common order of the Tribunal for the years 1990-91 and 1991-92 where this very issue has been decided on 21.07.2006, in its favour. The main argument of the Appellant is thus that the twin conditions of Section 263 of the Income Tax Act, 1961 (in short 'Act') have not been satisfied in this matter.

8. For this purpose, reliance is placed on the judgment of the Hon'ble Supreme Court in the case of *Commissioner of Income Tax v. Max India Ltd.* [(2007) 295 ITR 0282] and of this Court in the case of *M/s. Agasthiya Granite P Ltd. v. Assistant Commissioner of Income Tax* [T.C.(Appeal)No.450 of 2007 dated 16.04.2018]. Both cases touch upon the requirement of concurrent satisfaction of the twin conditions under



Section 263 of the Act.

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9. Per contra, learned counsel for the respondents would argue on the merits of the matter pointing out that there was, indeed, an error arising in order of assessment dated 28.03.2002, since the aspect of depreciation has not been looked into by the Assessing Authority. It is only to correct that error that the impugned action under Section 263 has been initiated.

10. We have heard learned counsel.

11. Section 263 of the Act requires concurrent satisfaction of the twin conditions of error and prejudice to the revenue. The locus classicus on this issue is the judgment of the Hon'ble Supreme Court in the case of *Malabar Industries Company Ltd. v. Commissioner of Income Tax* (243 ITR 83), wherein the Court settles the proposition thus:

'A bare reading of Section 263 of the Income-tax Act, 1961, makes it clear that the prerequisite to the exercise of jurisdiction by the Commissioner suo motu under it, is that the order of the Income-tax Officer is erroneous in so far as it is prejudicial to the interests of the Revenue. The Commissioner has to be satisfied of twin conditions, namely, (i) the order of the Assessing Officer sought to be revised is erroneous; and (ii) it is prejudicial to the interests of the Revenue. If one of them is absent - if the order of the Income-tax Officer is erroneous but is not prejudicial to the Revenue or if it is not erroneous but is prejudicial to the Revenue - recourse cannot be had to



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Section 263(1) of the Act.'

12. We are thus to test the impugned order on the angle of whether an error has been committed by the Assessing Authority in framing of assessment order dated 28.03.2002. It is true that that the order makes no reference to the issue of depreciation. However, this does not lead to the automatic conclusion that an error has been committed, particularly in light of the order of the Tribunal dated 21.07.2006. All the more for the reason that the aforesaid order has attained finality and has not been challenged by the Revenue.

13. The order of the Income Tax Appellate Tribunal dated 21.07.2006 for AY 1990-91 and 1992-93, is concerned with the very issue on which suo moto intervention has been taken by the respondent. In deciding the matter in favour of the petitioner, the Tribunal holds thus:

'

2. I.T.A.Nos.273 & 274/Mds/02: A.Y. 1990-91, 1992-93

The first issue raised is that the Commissioner of Income Tax (Appeals) erred in deleting the disallowance of depreciation on 'Victory House'.

3. The disallowance was made by the Assessing Officer because similar disallowance was done by the Assessing Officer in earlier assessment year on the premise that there was no justification in assessee's method of debiting entire depreciation on 'Victory House' to the Land Division in view of the fact that the Retail Division occupied comparative much larger space than the Land Division. Before the



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learned Commissioner of Income Tax (Appeals) it was submitted that, while assessing the business income both the Divisions are clubbed and assessed.

4. The learned Commissioner of Income Tax (Appeals) held that if the Assessing Officer has accepted the business and its income then he should have allowed the same even though he had estimated the income rejecting the book results. The learned Commissioner of Income Tax (Appeals) further referred to Central Board of Direct Taxes Circular No.29-D(XIX.14) F.No.45/239/65-IT dated 31.08.65 for the proposition that,

“Where it is proposed to estimate the profits and the prescribed particulars have been furnished by the assessee, the depreciation allowance should be separately worked out. In all such cases, the gross profit should be estimated and the deductions and allowances including the depreciation allowance should be separately deducted from the gross profit.”

In view of the aforesaid, the learned Commissioner of Income Tax (Appeals) directed the Assessing Officer to allow the depreciation as claimed by the assessee.

5. We have heard the rival contentions and perused the relevant records. We find that if the business of the Divisions is clubbed and the assessment of income is accordingly made, then there is no practical purpose in making any distinction in the claim of depreciation from one Division to another. This is more so when the same is being done on the mere opinion of the Assessing Officer that a particular business of the assessee does not require “that much” business premises. Hence, we uphold the orders of the learned Commissioner of Income Tax (Appeals) on this issue and decide the issue in favour of the assessee.’

14. The very question considered to be an error by the respondent

has been answered at paragraph 5 to state that the Appellant’s claim of depreciation is correct, for more than one reason. Firstly, the Tribunal



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finds that the re-allocation of depreciation qua the land and retail divisions is merely on the opinion expressed by the Assessing Authority that a particular business of the assessee does not require '*that much business premises*' .

15.This is only an incidental finding which has not impressed the Tribunal, and quite rightly so. That apart, they have also opined that there is no practical purpose to be served in making a distinction between the claim of depreciation qua retail business and land division business. The findings and conclusions of the Tribunal on identical facts and circumstances as for the present AY have been accepted by the respondent and as such, no question of law much less a substantial question of law arises in these circumstances.

16.It is true that the respondent did not have the benefit of the order of the Tribunal dated 21.07.2006 at the time when the suo moto action u/s 263 was proposed. However, the Tribunal did, in 2007, while passing the impugned order. A perusal of the order of the Tribunal reveals that the 2006 order was not brought to its notice and thus the Tribunal did not have the benefit of the reasoning under that order.

17.However, while deciding the matter today, we cannot close our



eyes to subsequent developments and the order of the Tribunal dated 21.07.2006 and the finality attached to it, thus assume great relevance.

The substantial questions of law, are, in light of the discussion above, answered in favour of the assessee/Appellant and adverse to the respondents.

18. Incidentally, we may also point out that the impugned order in this case is dated 25.07.2008. The provisions of Section 153(3) of the Act require a consequential order of assessment to be passed within a period of twelve (12) months from the end of the financial year when the order under Section 263 was received by the Chief Commissioner.

19. We specifically requested the learned Standing Counsel to ascertain whether any consequential order of assessment has been passed and she would confirm on instructions that there is no such order that is available on record. In such an event, the entire exercise undertaken by us in deciding the Tax Appeal becomes academic since, at this distance of time, no consequence can be given to the impugned order under Section 263 of the Act.

20. This appeal is allowed. No costs.

[A.S.M., J] [G.A.M., J]
06.08.2024



Index:Yes

Neutral Citation:Yes

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