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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

\+ ITA 227/2024

PR. COMMISSIONER OF INCOME TAX-7 .....Appellant

Through: Mr Puneet Rai, SSC, Mr Ashvini Kumar and Mr Rishabh Nangia, SCs and Mr Nikhil Jain, Advocate.

versus

M/S THE FERTILIZER CORPORATION OF INDIA LTD.

.....Respondent

Through: Mr S Krishnan and Mr Harshit Chauhan, Advocates.

CORAM:
HON'BLE THE ACTING CHIEF JUSTICE
HON'BLE MR. JUSTICE TUSHAR RAO GEDELA

O R D E R

% **09.01.2025**

1. The Revenue has filed the present appeal under Section 260A of the Income Tax Act, 1961 (hereafter *the Act*) impugning an order dated 01.06.2023 passed by the learned Income Tax Appellate Tribunal (hereafter *the ITAT*) in ITA No.3354/Del/2016 in respect of the assessment year (AY) 2004-05.

2. The Revenue had preferred the said appeal (ITA No.3354/Del/2016) impugning the order dated 18.03.2016 passed by the learned Commissioner of Income Tax (Appeals) [hereafter *the CIT(A)*], whereby the respondent's (Assessee) appeal against the assessment order dated 19.12.2011 passed under Section 147 of the Act was allowed. A plain reading of the said order indicates that the CIT(A) had not dwelled into the merits of the dispute whether the depreciation could be allowed or not and had allowed the Assessee's appeal on the ground that reopening of the assessment was impermissible by issuance of the notice under Section 148 of the Act.

3. The CIT(A) had reasoned that the notice dated 24.03.2011 was issued under Section 148 of the Act on account of change of opinion and concluded that the assessments would not be reopened on the said basis.

4. The grounds urged by the Revenue in its appeal ITA No.3354/Del/2016 are not readily discernible from the record. However, it is obvious that the principal ground that the Revenue could have urged to assail the order dated 18.03.2016 passed by the CIT(A), was on account of the CIT(A)'s decision in faulting the Assessing Officer (AO) in issuing the notice under Section 148 of the Act. However, it is seen that the learned ITAT has rejected the Revenue's appeal on the basis of the decision rendered in respect of other assessment years on merits whether the depreciation was allowable or not.

5. Compounding this error, the Revenue has preferred this appeal projecting question of law on the merits of the controversy and not on the ground whether the reopening of the assessment is justified.

6. This court, on a representation that the batch of matters contained a common question of law, had, on 17.05.2024, admitted the present appeal along with appeals relating to other assessment years in respect of the following question of law:-

> "a) Whether in the facts and circumstances of the case and in law, the ITAT was justified in not appreciating the fact that the assets were never used for generation of revenue, as against the facts in the ease of **CIT vs. Oswal Agro Mills Ltd. & Anr** [2010 SCC Online Del 4614], where this court has upheld the allowability of depreciation?"

7. Clearly the said question of law does not arise in the facts as noted

above.

8. Mr Krishnan, learned counsel for the Assessee fairly states that since the learned ITAT had not considered the Revenue's appeal, this mater may be remanded to the learned ITAT for considering afresh.

9. In view of the above, we set aside the impugned common order dated 01.06.2023 to the extent it deals with ITA No.3354/Del/2016 and remand the matter to the learned ITAT for considering afresh.

10. The appeal is disposed of in the aforesaid terms.

VIBHU BAKHRU, ACJ

TUSHAR RAO GEDELA, J

JANUARY 09, 2025

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Click here to check corrigendum, if any