

आयकर अपीलीय अधिकरण, 'डी' न्यायपीठ, चेन्नई

IN THE INCOME TAX APPELLATE TRIBUNAL

'D' BENCH, CHENNAI

श्री एन.आर.एस. गणेशन, न्यायिक सदस्य एवं
श्री ए. मोहन अलंकामणी, लेखा सदस्य केसमक्ष

BEFORE SHRI N.R.S. GANESAN, JUDICIAL MEMBER AND
SHRI A. MOHAN ALANKAMONY, ACCOUNTANT MEMBER

आयकर अपील सं./ITA No. 1689/Mds/2000

निर्धारण वर्ष / Assessment Year : 1995-96

M/s Sri Vasudeva Textiles Limited,
2/167, Ellappalayam Post,
Pogalur, Annur via
Coimbatore – 641 697.

v. The Joint Commissioner of
Income Tax,
Special Range – I,
Coimbatore – 18.

PAN : CQ - 9240

(अपीलार्थी/Appellant)

(प्रत्यर्थी/Respondent)

अपीलार्थी की ओर से/Appellant by : Sh. T. Banusekar, CA

प्रत्यर्थी की ओर से/Respondent by : Sh. N. Madhavan, JCIT

सुनवाई की तारीख/Date of Hearing : 04.01.2016

घोषणा की तारीख/Date of Pronouncement : 04.03.2016

आदेश /O R D E R

PER N.R.S. GANESAN, JUDICIAL MEMBER:

This appeal of the assessee is directed against the order of the Commissioner of Income Tax (Appeals), Coimbatore, dated 31.08.2000 and pertains to assessment year 1995-96.

2. In fact, this appeal was disposed of by an order dated 26.09.2005 holding that the notice issued for reopening the

assessment is barred by limitation. However, the Revenue filed an appeal before the High Court and the order of the Tribunal was set aside and the issue was remitted back to the file of the Tribunal with a direction to decide the same in respect of jurisdiction and on merit in accordance with law. In fact, the High Court directed the Tribunal as follows:-

“.....we set aside the order of the Income Tax Appellate Tribunal and remand the matter back to the Income Tax Appellate Tribunal, with a direction to decide the issue in respect of jurisdiction, especially whether the assessing officer is justified in re-opening the assessment under Section 147 of the Act and also on the merits of the case in accordance with law, as expeditiously as possible, after giving opportunity to the parties.....”

3. In view of the above direction of the High Court, the matter was taken up for final disposal.

4. Sh. T. Banusekar, the Ld. representative for the assessee, submitted that the first issue arises for consideration is with regard to jurisdiction to reopen the assessment under Section 147 of the Income-tax Act, 1961 (in short 'the Act'). According to the Ld. representative, the assessment was completed under Section 143(3) of the Act initially on 22.05.1996 determining loss of ₹6,83,436/-. The Assessing Officer reopened the assessment by

issuing notice under Section 148 of the Act. According to the Ld. representative, the Assessing Officer ought to have issued notice under Section 143(2) of the Act before expiry of twelve months from the end of the month in which the return was filed. In this case, 143(2) notice was not issued within twelve months. Therefore, the Tribunal in the earlier occasion found that the notice issued by the Assessing Officer is barred by limitation. However, the High Court revised the finding of the Tribunal and the matter was remitted back to the file of the Tribunal for considering the jurisdiction of the Assessing Officer in reopening the assessment under Section 147 of the Act. According to the Ld. representative, in the original assessment, the Assessing Officer considered the issue of depreciation on the windmill and the cost of replacement of machinery. Therefore, according to the Ld. representative, the reopening of the assessment is due to change of opinion. Hence, the Assessing Officer has no jurisdiction to reopen the assessment under Section 147 of the Act.

5. On the contrary, Shri N. Madhavan, the Ld. Departmental Representative, submitted that it is not a case of change of opinion. According to the Ld. D.R., the grounds raised before the Tribunal is

only in respect of limitation in issuing notice under Section 143(2) of the Act. According to the Ld. D.R., the assessee is not entitled to claim the expenditure on replacing the machinery as revenue expenditure. The assessee has also claimed excessive depreciation, therefore, the Assessing Officer has rightly found that the income otherwise taxable under the scheme of the Income-tax Act escaped assessment. Therefore, the Assessing Officer has rightly reopened the assessment. The Ld. D.R. further submitted that it is not a case of change of opinion.

6. We have considered the rival submissions on either side and perused the relevant material available on record. The assessee has raised grounds with regard to reopening of assessment on the ground that the Assessing Officer erroneously assumed jurisdiction due to change of opinion. The assessee has also raised grounds with regard to limitation in issuing notice under Section 143(2) of the Act. On the earlier occasion, this Tribunal found that the issue of notice under Section 143(2) is barred by limitation. However, the High Court has set aside the order of this Tribunal with a direction to dispose of the appeal after considering the jurisdiction of the Assessing Officer to reopen the assessment and the appeal on

merit. Therefore, what mainly is to be decided is only jurisdiction of Assessing Officer to reopen the assessment. In other words, whether the reopening of the assessment under Section 147 of the Act is due to change of opinion or not. We have carefully gone through the original assessment order dated 22.05.1996, a copy of which is available at page 62 of the paper-book. In the assessment order, in fact, the Assessing Officer considered the windmill subsidy and found that the windmill subsidy is a capital reserve. However, the Assessing Officer wrongly treated the same in the computation statement. The Assessing Officer found that the subsidy was given by the State Government to promote industries, therefore, it does not form part of total income. With regard to value of machinery replaced, without any discussion the Assessing Officer allowed the value of the machinery replaced as revenue expenditure. Therefore, it is obvious that the Assessing Officer without examining the nature of expenditure incurred and the nature of the machinery replaced, has simply accepted the claim of the assessee with regard to cost of the machinery replaced. This Tribunal is of the considered opinion that the Assessing Officer is expected to examine the nature of machinery replaced by the assessee and thereafter it has to be decided whether what was incurred by the

assessee is capital expenditure or revenue expenditure. Since such an exercise was not done in the original assessment by the Assessing Officer, this Tribunal is of the considered opinion that there is no question of change of opinion as far as the cost of machinery replaced. In other words, the Assessing Officer has not taken any view other than allowing the claim of the assessee by simply making the reference. Therefore, this reference in the assessment order with regard to value of machinery cannot be considered to be a view taken by the Assessing Officer. Therefore, there is no question of any change of opinion as claimed by the assessee. In view of the above, this Tribunal is of the considered opinion that the Assessing Officer has rightly reopened the assessment. Therefore, this Tribunal do not find any reason to interfere with the order of the lower authority. Accordingly, the same is confirmed.

7. Now coming to the claim of the assessee on merit, the first issue is with regard to subsidy given for windmill.

8. Sh. T. Banusekar, the Ld. representative for the assessee, submitted that the subsidy was given as incentive to the assessee for setting up of a non-conventional power generating wind-turbine

unit. The subsidy was not given to meet the part of the cost of windmill. Referring to the Explanation 10 to Section 43(1) of the Act, as introduced by Finance (No.2) Act, 1998 with effect from 01.04.1999, the Ld. representative submitted that this explanation was introduced with a view to reduce the direct and indirect subsidy from the cost of fixed asset. However, this amendment was brought in the statute book with prospective operation. The intention of the Parliament to reduce the capital subsidy from the cost of the fixed asset is for subsequent assessment year. Therefore, Explanation 10 to Section 43(1) of the Act is not applicable during the year under consideration.

9. Referring to the judgment of Apex Court in CIT v. P.J. Chemicals Ltd. (1994) 210 ITR 830, the Ld. representative submitted that the subsidy is intended as an incentive to encourage the entrepreneurs to establish industries. The Apex Court further found that the expression "actual cost" in Section 43(1) of the Act needs to be interpreted liberally. The subsidy does not partake of the incidents which attract the conditions for its deductibility from the actual cost. Therefore, the Apex Court found that the amount of subsidy is not to be deducted from the actual cost under Section

43(1) of the Act for the purpose of computing depreciation. In view of this judgment of the Apex Court, according to the Ld. representative, the subsidy granted to the assessee for establishing the windmill cannot be deducted for computing the allowable depreciation.

10. On the contrary, Shri N. Madhavan, the Ld. Departmental Representative, submitted that the assessee received subsidy on the windmill from State Industries Promotion Corporation of Tamil Nadu Ltd. to the extent of ₹6,24,000/-. The subsidy was granted specifically for the windmill installed by the assessee. Therefore, the subsidy should be deducted from the cost of the windmill to arrive at the actual cost of windmill under Section 43(1) of the Act. Since this was not considered in the original assessment, the Assessing Officer reduced the subsidy granted to the assessee by State Industries Promotion Corporation of Tamil Nadu Ltd. and disallowed the excessive depreciation granted to the assessee. Therefore, the CIT(Appeals) has rightly confirmed the disallowance.

11. We have considered the rival submissions on either side and perused the relevant material available on record. Admittedly, the assessee has received subsidy from State Industries Promotion

Corporation of Tamil Nadu in respect of windmill installed by the assessee. The assessee has filed a copy of the agreement said to be entered with State Industries Promotion Corporation of Tamil Nadu Ltd. at page 38 of the paper-book. This agreement clearly says that the assessee is one of the beneficiaries who applied for grant of subsidy under 15% State capital subsidy in respect of the windmill established at Aralvaimozhi Village, Thovalai Taluk, Kanyakumari District in the State of Tamil Nadu. The subsidy will be disbursed as and the windmill was erected by the assessee. The agreement also shows that the assessee shall utilize the subsidy for the industrial unit in accordance with the scheme within a period of one year from the date of receipt of the last instalment or full amount. It is further clarified that 85% of the subsidy will be disbursed after verifying as to created physically. Another 15% shall be disbursed after the unit commenced its commercial production. From the above agreement it is obvious that the subsidy was given by the Government for creation of a capital asset, namely, the windmill for generating power.

12. We have carefully gone through the judgment of Apex Court in P.J. Chemicals Ltd. (supra). In the case before the Apex Court,

the assessee claimed depreciation after reducing the subsidy granted for establishing industries in the backward area. The Apex Court, after considering the scheme of the Act, found that if a portion of cost is met directly or indirectly by any other person or authority, it should be deducted for arriving at the cost of the asset. The real question is as to the character and nature of subsidy. The Apex Court further observed that the real question is as to the character and nature of subsidy whether it was really intended to subsidise the cost of the capital or was intended as an incentive to encourage to move to backward area to establish industries. After taking note of the conflicting judicial opinions among various Courts in the country, the Apex Court found that the Government subsidy, it is not unreasonable to say, is an incentive not for the specific purpose of meeting a portion of the cost of the assets, though quantified as or geared to a percentage of such cost. If that be so, it does not partake of the character of a payment intended either directly or indirectly to meet the actual cost. Accordingly, the Apex Court found that the subsidy granted to the assessee cannot be reduced from the actual cost for computing depreciation. In fact, the Apex Court approved the judgment of Punjab & Haryana High Court. In fact, the Apex Court observed as follows at page 481:

"On a consideration of the matter the view that commends itself as acceptable is the one which has commended itself to the majority of the High Courts. It is, of course, not the numerical strength that prevails though the fact that a particular view has commended itself to a majority of the High Courts in the country is a matter for consideration but the tensile strength of the acceptable logic in those decisions. It is aptly said that "a judge who announces a decision must be able to demonstrate that he began from recognized legal principles and reasoned in an intellectually coherent and politically neutral way to his result". In the present case the reasoning underlying, and implicit in, the conclusion reached by the majority of the High Courts cannot be said to be an unreasonable view and on a preponderance of preferability that view commends itself particularly in the context of a taxing statute. The expression "actual cost" needs to be interpreted liberally. The subsidy of the nature we are concerned with, does not partake of the incidents which attract the conditions for their deductibility from "actual cost".

The Government subsidy, it is not unreasonable to say, is an incentive not for the specific purpose of meeting a portion of the cost of the assets, though quantified as or geared to a percentage of such cost. If that be so, it does not partake of the character of a payment intended either directly or indirectly to meet the "actual cost". We should prefer the reasoning of the majority of the High Courts to the one found acceptable by the High Court of Punjab and Haryana."

In this case also, the subsidy was admittedly granted for establishing windmill. It is not for the purpose of carrying out the operation of the windmill. Since the part of the cost was met by subsidy granted by the Government, this Tribunal is of the

considered opinion that the judgment of Apex Court in P.J. Chemicals (supra) is squarely applicable to the facts of the case. Therefore, this kind of subsidy does not partake of the incidents which attract the conditions for its deductibility from the actual cost. Therefore, by respectfully following the judgment of Apex Court, we hold that the subsidy cannot be reduced from the actual cost for the purpose of computing depreciation. As rightly submitted by the Ld. representative for the assessee, Explanation 10 to Section 43(1) of the Act was introduced with effect from 01.04.1999. Therefore, it is not applicable for the year under consideration. In view of the above decision, we are unable to uphold the orders of the lower authorities. Accordingly, the orders of the lower authorities are set aside and the Assessing Officer is directed not to reduce the subsidy of ₹6,24,000/- from the actual cost while computing depreciation.

13. The next ground of appeal is with regard to cost of replacement of machinery to the extent of ₹25,84,620/-.

14. Sh. T. Banusekar, the Ld. representative for the assessee, submitted that the assessee has replaced ring frames, draw frames and carding machine. The cost of replacement of machinery was

treated as current repairs. However, the authorities below rejected the claim of the assessee. Referring to the judgment of Madras High Court in CIT v. Janakiram Mills Ltd. & Others (2005) 275 ITR 403, the Ld. representative submitted that the cost of machinery was allowed as revenue expenditure. Referring to the judgment of various High Courts, including the judgment of Kerala High Court in CIT v. Steel Complex Ltd. (1999) 238 ITR 1054, the Ld. representative submitted that when the expenditure was resulting in advantage of enduring nature, but nevertheless the Revenue feels the expenditure laid out would still be regarded as revenue in nature. Referring to the judgment of Apex Court in CIT v. Mahalakshmi Textile Mills Ltd. 919670 66 ITR 710, the Ld. representative submitted that the cost of replacement of machinery has to be allowed as revenue expenditure. Therefore, the CIT(Appeals) is not justified in confirming the disallowance made by the Assessing Officer. The Ld. representative has also placed reliance on the judgment of Madras High Court in CIT v. Sree Narasimha Textiles (P.) Ltd. (1999) 239 ITR 351 and the decision of this Bench of the Tribunal in Ambika Cotton Mills Ltd. v. JCIT (2001) 71 TTJ 871 and the judgment of Madras High Court in CIT v. Gitanjali Mills Ltd. (2004) 265 ITR 681.

15. On the contrary, Shri N. Madhavan, the Ld. Departmental Representative, submitted that what was replaced by the assessee is independent machinery in the textile mill. Therefore, it cannot be allowed as revenue expenditure or current repair. Therefore, the CIT(Appeals), according to the Ld. D.R., has confirmed the order of the Assessing Officer by placing reliance on the judgments of Apex Court in CIT v. Mir Mohammed Ali (53 ITR 165) and in CIT v. Ballimal Naval Kishore (224 ITR 414).

16. We have considered the rival submissions on either side and perused the relevant material available on record. The replacement of ring frames, draw frames and carding machine was subject matter of consideration before the Apex Court in CIT v. Saravana Spinning Mills P. Ltd. (2007) 293 ITR 201 and in CIT v. Ramaraju Surgical Cotton Mills (2007) 294 ITR 328. The Apex Court held that replacement of assets would amount to revenue expenditure. Therefore, this Tribunal is of the considered opinion that the expenditure incurred by the assessee for replacing the ring frames, draw frames and carding machine has to be considered in the light of the judgments of Apex Court in Saravana Spinning Mills P. Ltd. (supra) and Ramaraju Surgical Cotton Mills (supra). Since both the

judgments of Apex Court were not considered by the lower authorities, this Tribunal is of the considered opinion that the matter needs to be reconsidered in the light of the judgments rendered by the Apex Court in Saravana Spinning Mills P. Ltd. (supra) and Ramaraju Surgical Cotton Mills (supra) and thereafter decide the same in accordance with law after giving reasonable opportunity to the assessee.

17. In the result, the appeal of the assessee is partly allowed.

Order pronounced on 4th March, 2016 at Chennai.

sd/-

(ए. मोहन अलंकामणी)

(A. Mohan Alankamony)

लेखा सदस्य/Accountant Member

sd/-

(एन.आर.एस. गणेशन)

(N.R.S. Ganesan)

न्यायिक सदस्य/Judicial Member

चेन्नई/Chennai,

दिनांक/Dated, the 4th March, 2016.

Kri.

आदेश की प्रतिलिपि अग्रेषित/Copy to:

1. अपीलार्थी/Appellant
2. प्रत्यर्थी/Respondent
3. आयकर आयुक्त (अपील)/CIT(A), Coimbatore
4. आयकर आयुक्त/CIT, Coimbatore
5. विभागीय प्रतिनिधि/DR
6. गार्ड फाईल/GF.