

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

INCOME TAX APPEAL NO. 1105 OF 2008

The Commissioner of Income Tax-12 .. Appellant.
v/s.
M/s. Monika India .. Respondent.

Mr. P.C. Chhotaray, for the Appellant.
Mr. S. P. Goyal, Partner of Respondent, present-in-person.

**CORAM: M.S.SANKLECHA, &
A.K.MENON, JJ.**

**RESERVED ON : 1st APRIL, 2016.
PRONOUNCED ON : 16th APRIL, 2016.**

JUDGMENT (Per M. S.Sanklecha,J.):

This Appeal under Section 260-A of the Income Tax Act, 1961 (the Act), challenges the order dated 13th December, 2007 passed by the Income Tax Appellate Tribunal (the Tribunal) for the Assessment Year 1986-87.

2 This appeal was admitted on 12th January, 2009 on the following substantial question of law:-

“ Whether on the facts and in the circumstance of the case, the Tribunal is right in law in allowing the appeal of the assessee by directing to delete the addition of Rs.91.54 lac disallowed by the Assessing Officer on the ground that the liability was not ascertained and is in the nature of contingent liability?”.

At that time, the Court directed that this Appeal should be heard along with Income Tax Reference No.320 of 1998.

S.R.JOSHI

3 We have on 1st April, 2016 heard both – Income Tax Reference bearing No.320 of 1998 and the present appeal. The question of law posed for our opinion in the Income Tax Reference No. 320 of 1998 reads as under:-

“ Whether on the facts and in the circumstances of the case, the Tribunal was right in law in setting aside the order of the Commissioner of Income Tax and restoring that of the Income Tax Officer allowing the liability on account of customs duty at Rs.1,78,83,846/-?”.

4 We find that the impugned order of the Tribunal has allowed the Respondent-Assessee's appeal by following the order dated 17th July, 1989 passed by it in respect of Assessment Year 1985-86. In the meantime, pending the final disposal of the appeal for Assessment Year 1986-87, the Tribunal, at the instance of the Revenue sought our opinion in Income Tax Reference No.320 of 1998 in respect of Assessment Year 1985-86 (Tribunal Order dated 17th July, 1989) on the question as reproduced herein above in para 3.

5 Briefly, the facts are as under:-

- (a) The Respondent-Assessee had on 2nd April, 1984 entered into agreement for purchase of 250 metric tonnes of Synthetic Waste from one M/s. Vinay Industries. In terms of the above agreement dated 2nd April, 1984, M/s. Vinay Industries were to import the Synthetic Waste from Taiwan and sell it to the Respondent-Assessee at cost + Rs.1/- per kg. The costs were to include all expenses incurred by the seller from import and handing it over to the Respondent-Assessee i.e. inclusive of Customs Duty, Octroi charges,

Bank charges etc. M/s. Vinay Industries, consequent to the agreement imported the Synthetic Waste. At the time of import, there was an increase in duties of customs on Synthetic Waste. M/s. Vinay Industries challenged the increase in the duties of customs in the Apex Court. This increase resulted on further amount of Rs. 91.54 lakhs being payable as Custom Duties. However, M/s. Vinay Industries issued an invoice for an amount of Rs.91.54 lakhs (Addl. Customs duty liability) to the Respondent- Assessee.

- (b) It appears that M/s. Vinay Industries, thereafter, withdrew its challenge to the increase in the levy of Customs Duty filed before the Supreme Court. This led the Respondent-Assessee to file a Civil Suit in the Ludhiana Civil Court, disputing its liability to pay the additional Customs Duty of Rs.91.54 lakhs to M/s. Vinay Industries. Nevertheless, the Respondent-Assessee claiming to follow a Mercantile System of Accounting, debited an amount of Rs.91.54 lakhs as its expenditure towards purchase of Synthetic Waste from M/s. Vinay Industries and sought a deduction.
- (c) However, in view of the suit filed by the Respondent-Assessee against M/s. Vinay Industries before the Ludhiana Civil Court, the Assessing Officer during the Assessment Proceedings took a view that the amount of Rs.91.54 lakhs cannot be allowed as an expenditure as the same was contingent in nature being the subject of dispute before the Ludhiana Civil Court. On first appeal also, the Commissioner of Income Tax (Appeals) [CIT(A)] upheld the view of the Assessing Officer and confirmed the addition done by the Assessing Officer.

- (d) On further appeal, the Tribunal allowed the appeal by following its order dated 17th July, 1989 for Assessment Year 1985-86.
- (e) Being aggrieved, the Revenue is in appeal before us.

6 We find that there are two vital differences in facts between those existing in Assessment Year 1985-86 and that existing in the subject Assessment Year 1986-87.

7 Firstly, the clauses of the agreements which is a subject matter of dispute in both the Assessment Years are different.

- (a) For the Assessment Year 1985-86 which led to ITR 320 of 1998, the clause of the agreement between the Respondent-Assessee and its sellers reads as under:-

“ To avoid any misunderstanding and confusion at some later date, it is hereby stipulated that although the present state, C.V.D. which comes to Rs.36/- per kg. is Auxiliary duty, not applicable in terms of Court Orders on the consignments being imported by the seller which the seller, in turn, has agreed to supply to the buyer, but in case at some later stage, any such liability occurs and any duty is required to be paid, the same too, will be the exclusive liability of the Buyer as the same will be nothing but a part of the cost and for this purpose, the buyer has undertaken to stand guarantee in any manner acceptable to the customs or the Bank to the effect that in case any such duty becomes payable at any stage, the same will be the exclusive liability of the buyer and not that of the seller by virtue of this Agreement.”

- (b) While the clause of the agreement between the Respondent-Assessee and its seller i.e. M/s. Vinay Industries which arises for consideration in the subject Assessment Year reads as under:-

S.R.JOSHI

“ Whereas, as a result of negotiations, the buyer has agreed to pay to the seller a net profit calculated @ Rs.1/- per kg. On the supply of the said Synthetic Waste. All the expenses will be taken into consideration such as custom duties, freight octroi, cartage, bank charges, interest, demurrage charges and clearance charges, which computing the cost except the court expenses with regards to CVD and Customs duties which are demanded in excess by the custom department.”

The aforesaid clause as existing in the subject Assessment Year has not at all been considered by the Tribunal in the impugned order while allowing the Respondent-Assessee's appeal for the Assessment Year 1986-87. The distinction in facts has been ignored by Tribunal while passing the impugned order.

8 Secondly, in the present facts, the Respondent-Assessee filed a suit against its sellers M/s. Vinay Industries in the Civil Court at Ludhiana, apparently disputing its liability to pay the additional Customs Duty of Rs.91.54 lakhs. Thus, the amount payable, has not been crystallized during the subject Assessment Year according to the Revenue. This fact was absent in the proceedings leading to the order dated 17th July, 1989 passed in respect of Assessment Year 1985-86. The aforesaid distinction was also missed sight of by the Tribunal while passing the impugned order dated 13th December, 2007.

9 The aforesaid distinction in facts as brought in paragraphs 7 and 8 above were completely overlooked. The Tribunal passed the impugned order dated 13th December, 2007 holding itself bound by its order dated 17th July, 1989 passed in respect of Respondent-Assessee for the Assessment Year 1985-86.

S.R.JOSHI

10 We find that the Tribunal in passing the impugned order has not considered the different fact-situation in the Assessment Year 1986-87 from that existing in Assessment Year 1985-86. This difference is in the clauses of the agreements as well as the fact of the Respondent-Assessee disputing its liability to pay the Customs duty of Rs.91.54 lakhs to M/s. Vinay Industries by filing a Civil Suit in the Court of Ludhiana. This dispute between the seller and the Respondent-Assessee existing in the Assessment Year 1986-87 is totally absent during the Assessment Year 1985-86.

11 In the above view, the impugned order of the Tribunal dated 13th December, 2007 is quashed and set aside. The appeal of the Respondent-Assessee is restored to the Tribunal for final disposal. This after taking into account, different factual situation in the subject Assessment Year to that existing in the Assessment Year 1985-86. Therefore, at this stage, we do not answer the substantial question of law as it could appropriately arise only after the Tribunal has dealt with the appeal before it in the context of the fact situation as existing for the subject Assessment Year. However, we request the Tribunal to decide the appeal as expeditiously as possible as it relates to Assessment Year 1986-87. All contentions kept open.

12 Accordingly, **Appeal allowed** in the above terms. No order as to costs.

(A.K.MENON,J.)

(M.S.SANKLECHA,J.)

S.R.JOSHI