

ORDER SHEET

ITA NO.724 OF 2004
IN THE HIGH COURT AT CALCUTTA
Special Jurisdiction (Income Tax)
ORIGINAL SIDE

COMMISSIONER OF INCOME TAX, KOLKATA-IV
Versus
ALCOVE INDUSTRIES LIMITED

BEFORE:

The Hon'ble JUSTICE SOUMITRA PAL

AND

The Hon'ble JUSTICE MIR DARA SHEKO

Date: 17th August, 2015

Appearance
Mr. S. N. Dutta, Adv.
..for the appellant
Mr. Anupa Banerjee, Adv.
..for the respondent

This appeal, under section 260A of the Income Tax Act, 1961 (for short the "Act"), has been preferred by the appellant against the order dated 30th April, 2004 passed by the Income Tax Appellate Tribunal, Kolkata in ITA Nos. 915 and 916 9Kol) of 1999 for the assessment years 1995-96 and 1996-97.

The appeal was admitted on the following substantial questions of law:

- (i) *Whether the I.T.A.T. erred in law in reversing its own ex parte order passed in the matter based on the identical issue and existing facts and whether such change of opinion is sustainable in law?*
- (ii) *Whether the Income Tax Appellate Tribunal was justified in allowing expenditure incurred for project expenditure for those period when the project was not in operation and/or in existence?*

- (iii) *Whether the Income Tax Appellate Tribunal was wrong in accepting the plea of deferred Revenue expenditure in the absence of any provisions in the Income Tax Act, 1961 in that regard and/or the said acceptance I.T.A.T. is in violation of section 43B of the I.T. Act as such perverse?*

So far as the first question is concerned, it is submitted by Mr. S.N. Dutta, learned Advocate for the appellant that the Tribunal, by the order under appeal, erred in law in reversing in its own order passed in the matter based on the facts on record and thus it was a change of opinion. Submission is as the Tribunal by the order dated 21st February, 2003 had turned the plea of the assessee, the order passed subsequently on 30th April, 2004 allowing deduction of the expenditure incurred was illegal.

Mrs. Anupa Banerjee, learned advocate for the respondent submits that after ex parte order dated 21st February, 2003 was passed, her client had filed a Miscellaneous Petition under Section 254(2) of the Act before the Tribunal praying for recall of the order dated 21st February, 2003 which is not annexed to the Paper Book. Submission is though it has been submitted on behalf of the appellant that the Tribunal has no power to recall the order and to rehear the appeal on merits, however, in view of the judgments of the High Court in *Income-tax Officer vs. Murlidhar Sarda*; (1975) 99 ITR 485 (Cal) and *Khaitan Paper & Industries Ltd. vs. Commissioner of Income-tax*; (2005) 148 Taxman 326 (Cal), as the settled position of law is the Tribunal has the power to restore and rehear an appeal already disposed of on merits and as in the instant case it is evident from the documents

filed that the assessee was prevented by sufficient cause from not appearing before the Tribunal, the Tribunal was justified in recalling the order and rehearing the appeal. Let a copy of the Miscellaneous Petition under section 254(2) of the Act filed before the Tribunal, furnished be kept on record.

Admittedly Paper Book filed by the appellant does not contain the Miscellaneous Petition filed by the respondent before the Tribunal for recalling the order dated 21st February, 2003 and the order passed thereon. As it appears that the Tribunal had recalled the order dated 21st February, 2003 and had proceeded to hear the appeal afresh after giving notice to the parties and had passed the impugned order, in view of the law laid down in *Income Tax Officer vs. Murlidhar Sarda* (supra) and in *Khaitan Paper & Industries Ltd* (supra), the question no.(i) is answered in the negative, against the Revenue and in favour of the assessee.

So far as the question no.(ii) is concerned, it is submitted by Mr. Dutta that as under the law loss has to be set off against the income in that assessment year, the Tribunal erred in law in setting off the said loss against the assessment year 1995-96. Moreover, the judgment in *Madras Industrial Investment Corporation Ltd. vs. Commissioner of Income-tax: 225 ITR 802* relied on by the Tribunal is not relevant to the facts of the case as it deals with facts relating to a company issuing debentures at a discount. Relying on the judgment in *Banyan Networks Pvt. Ltd. vs. Assistant Commissioner of Income-tax; (2015) 373 ITR 566 (Madras)* submission is deferred revenue expenditure cannot not be allowed to be carried forward.

Mrs. Banerjee relying on the judgment in *Binani Cement Ltd. vs. CIT: (2015) 277 CTR (Cal) 49* submits that since deduction of expenses as deferred

revenue expenses was accepted by the Assessing Officer in earlier two assessment years and such expenditure was allowed to be spread over and as in the instant year the project was abandoned and assessee as a prudent businessman had written off the entire balance expenditure, the Tribunal was justified in confirming the order of the CIT(A). Since the Assessing Officer while disallowing the claim held that there should be direct nexus between the income and expenses of that particular year, as it is evident from the order of the CIT rejecting the stand of the Assessing Officer that in the assessment year 1995-96 this undertaking had a turnover of more than Rs.99 lakhs, the Tribunal was justified in allowing the deduction.

It appears from the order of the Assessing Officer that the assessee had submitted that as the project was not making profit, it was abandoned. The entire expenses were written off during the year. However the Assessing Officer disallowed the expenditure as it was not related to the current year's income. The Assessing Officer, held that the income or loss for a particular year has to be determined after taking into account the expenses incurred to earn the profit and there should direct nexus between the income and the expenses of that particular year. However, in appeal, the CIT (A) found that in the assessment year 1995-96 as the assessee had a turnover of more than Rs.99 lakhs derived from the same business, the contention of the Revenue, that there was no nexus between the expenditure claimed and income derived was not tenable. Accordingly the claim of the assessee was allowed. In appeal the Tribunal found that the revenue did not dispute the fact the Assessing Officer had allowed spread over of expenditure in earlier two years. In our view since

the project was abandoned in the assessment year 1995-96 and the entire expenses was written off during the said assessment year, the issue stands covered by the judgment in Binani Cements [supra] wherein it was held that *“The decision to abandon the project was the cause for claiming the deduction. The decision was taken in the relevant year. It can therefore be safely concluded that the expenditure arose in the relevant year.”* (paragraph 11). In view of the law laid down in the judgment of the jurisdictional Court in Binani Cement [supra], the judgment in Banyan Networks [I] Pvt. Ltd. [supra] does not require consideration. Therefore, the question no.2 is answered in the affirmative, against the revenue and in favour of the assessee.

So far as the question no.3 is concerned, we are of the view that since section 43B of the Income Tax Act deals with certain deductions to be made on actual payment, that is payment of tax, duty, cess or fee, or any sum payable by the assessee as an employer by way of contribution to any provident fund or superannuation fund or gratuity fund or any other fund for the welfare of the employees or other deduction as referred to in section 36 or any sum payable by the assessee as interest on any loan or advance or any sum payable by the assessee as an employee in lieu of any leave at the credit of his employer or any sum payable as interest on any loan or borrowing from any public financial institution in accordance with the terms and conditions, which does not have any bearing on the subject matter in issue, and as we find that the Tribunal, while allowing the matter had directed the Assessing Officer to verify whether the claim of Rs.4,60,000/- is already embedded in the amount of Rs.31,83,750/- and after verification to allow

deduction on the actual amount written off by the assessee during these years, the question need not be answered.

Therefore, the appeal is dismissed. No order as to costs.

(SOUMITRA PAL, J.)

(MIR DARA SHEKO, J.)

AKGoswami/SM