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IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

INCOME TAX APPEAL NO.413 OF 2013
WITH
INCOME TAX APPEAL NO.458 OF 2013
WITH
INCOME TAX APPEAL NO.449 OF 2013
WITH
INCOME TAX APPEAL NO.1511 OF 2013
WITH
INCOME TAX APPEAL NO.1713 OF 2013

The Commissioner of Income Tax-4,
Aayakar Bhavan, M.K.Road,
Mumbai - 400 020.

..Appellant.

V/s.

M/s. Karma Energy Ltd.,
Empire House, 214, Dr. D.N. Road,
Ent. A.K. Nayak Marg, Fort,
Mumbai - 400 001.

..Respondent.

Mr.Suresh Kumar for the Appellant.

Mr.J.D.Mistri, Senior Advocate with Mr.Atul K.Jasani for the
respondent.

CORAM : S.C.DHARMADHIKARI AND A.K.MENON, JJ.

RESERVED ON : 18TH MARCH, 2015

PRONOUNCED ON : 7TH APRIL, 2015

JUDGMENT (PER A.K.MENON, J.)

1. All these appeals raise the following common questions
of law, which read as under:-

- A. Whether on the facts and in the circumstances of the case and in law, the Tribunal was right in allowing the assessee company is the actual price and noted inflated price as held by the Assessing Officer despite there being clear evidence to the contrary ?
- B. Whether on the facts and in the circumstances of the case and in law, the Tribunal was right in allowing depreciation on the inflated cost of windmills purchased by the assessee?
- C. Whether on the facts and in the circumstances of the case and in law, the Tribunal was right in allowing excess lease rentals on the basis of inflated cost of windmills ?

2. These three identical questions pertain to assessment years 2002-03, 2003-04, 2004-05, 2005-06 and 2006-07. In Income Tax Appeal No.1515/13 and 1713/13, these three questions are common. There is however, an additional question which is common in appeal Nos. ITXA Nos.1713/13 & 1511/13 which is reproduced below:-

- D. Whether on the facts and in the circumstances of the case and in law, the Tribunal was right in holding that the payments made for sharing of utilities do not attract section 194C of the Income Tax Act and, therefore, disallowance made by the Assessing Officer under section 40(a)(ia) is to be deleted ?

3. It will be necessary to advert to a few facts before dealing with these appeals. The facts in Income Tax Appeal No.413/13 may be taken up. The assessee belongs to the Weizmann Group of companies. A survey was conducted at the premises of NEG Micon (I) P. Ltd. at Chennai. The department found that the said company had sold 20 windmills to the Weizmann Group which included the assessee. According to the department, the average price of the windmill was between Rs.2.25 to Rs.2.50 crores whereas the sale price to this group was between Rs.3.6 to Rs.3.6 crores.

4. In the assessment proceedings, the assessee had claimed 100% depreciation on 12 windmills. According to the Assessing Officer, the excess payment made towards purchase price of windmills was received back by the Weizmann group routed through third parties while maintaining a claim of 100% depreciation by the assessee. The Assessing Officer, therefore, disallowed depreciation in respect of 12 windmills installed by the assessee holding that the cost of windmills were inflated by Rs.1 crore per windmill. The Assessing Officer also noticed that the assessee had taken a 9MW windfarm on lease from M/s.Weizmann Ltd. and has paid lease rent of Rs.5,80,51,788/-. The assessee claimed reliefs under Section 40(2)(b) of the Income Tax Act, 1961 (the Act).

5. The Commissioner of Income Tax (Appeals) deleted the additions made by the Assessing Officer stating that during the search and seizure of the business premises, no evidence of the assessee's complicity in the transactions with NEG Micon was gathered. It was also noticed that the assessment order did not indicate that the assessee had paid a higher price for the purchase of windmills. Apropos, the lease rentals, the Commissioner of Income Tax (Appeals) deleted the disallowance. All payments were made by crossed account payee cheques and it was fully accounted for in the books of account. The Commissioner of Income Tax (Appeals) further held that since there was nothing on record to prove that there was excessive payment on account of lease rent, there was no question of adopting a different figure for the purchase price in respect of leased windmills.

6. Being aggrieved by the order, the Revenue filed an appeal before the ITAT on or about 6th June, 2007. By order dated 7th September, 2012 the ITAT dismissed the appeal.

7. Learned counsel for the Revenue submitted that the price of the windmills purchased by the assessee was not the actual price but an inflated price. According to Mr.Suresh Kumar, the findings of survey at NEG Micon revealed bogus purchase bills of

Rs.15.31 crores. He further submitted that sum was received back in cash. He submitted that commission had been paid by NEG Micon only in respect to the sales to Weizmann group. According to the Revenue, in respect of parties related to the Weizmann group, there were certain non-existent business transactions to accommodate flow of funds. Funds have been routed only come back to the Weizmann group which clearly shows that there was collusion between M/s. NEG Micon and Weizmann whereby accommodation entries in the form of commission were resorted to with the specific intention of enriching the Weizmann group. The Assessing Officer had disallowed the claim on the ground that the value of equipment was inflated and, therefore, the provisions of section 40A(2)(b) of the IT Act would apply in this case.

8. Mr.Mistri on the other hand submitted that the case of the Revenue is completely consistent with the record which will show that the Assessing Officer had proceeded merely on the basis of conjecture without any evidence as the assessee causing the costs to be inflated in order to enable the group company to benefit. According to Mr.Mistri, the contention of the revenue is that subsequent transactions have been put into place all of which enure to benefit of the Weizmann group is incorrect. It is the revenue's contention that the commission involved in the deal has been indirectly handed back to the Weizmann group. According to

Mr.Mistri, these contentions are misconceived. He supported the order of the Commissioner of Income Tax (Appeals) as well as the ITAT and contended that no question of law would arise in these appeals.

9. On the additional question in ITXA Nos.1511/13 and 1713/013, Mr.Mistri submitted that no substantial question arises in the facts of the case and that disallowance made by the Assessing Officer was under section 40A(2)(b) of the I.T. Act is to be rightly deleted.

10. Having heard both counsel and having perused the record, we find that the order of the Appellate Tribunal cannot be faulted. The order of the Appellate Tribunal in the set of appeals filed by the Revenue against M/s.Karma Energy Ltd., the Respondent herein as well M/s. Weizmann Ltd. has also taken into account all contentions including that during the course of investigation, NEG Micon was unable to provide any corroborative evidence before the Assessing Officer. Apparently, NEG Micon denied that they have paid these commissions.

11. The Tribunal considered the previous findings of certain group companies of Weizmann being involved and on inquiry, it was found that the commission / fees paid by NEG Micon was not

received by the assessee. M/s.Samrat Spinner and M/s.Kakatiya Industries had paid Rs.115 lacs and Rs.303 lacs to M/s.Suhami Traders (presently known as Suhami Power & Finance Corporation), whose address is the same as that of the present assessee. According to the Assessing Officer, the commission paid by NEG Micon to Suhami was thus received by a Weizmann group company. Therefore, the excess money paid for the windmills was routed back to Weizmann Group, while the assessee, also a Weizmann group company claimed 100% depreciation. The collusion between NEG Micon and Weizmann group it is alleged was in order to deprive the Revenue.

12. A comparative chart has been prepared of the transactions entered into by the Respondent as well as Precot Mills Ltd. claiming difference in prices of windmills pegged at about Rs.98 lacs. However, comparison with companies like Rajasthan State Power Corporation Ltd. reveals that the price is easily justifiable given the difference in specifications. It is necessary to mention that in the course of the comparison provided between the price paid by Weizmann and Savita Chemicals Ltd. and the assessee, it revealed that Savita Chemicals purchased similar windmills at price of ₹405.00 lacs as against ₹360.64 lacs in the case of the assessee. The performance, specifications and type of requirements were very similar in these cases.

13. Accordingly, the Tribunal considered the statement of comparable cases made by the assessee and concluded that the payment made by the assessee was certainly not inflated. The Tribunal considered the fact that setting up of windmills was a specialized task and came to the conclusion that the Assessing Officer had no evidence on record to establish that the price of windmills paid by the assessee was not the actual price or that the price was inflated. The Tribunal found that the Assessing Officer had proceeded on the basis of a presumption that the cost of each windmill is inflated by Rs.1 crore and it had not been proved by documentary evidence that such money came back to the assessee from the concern to whom commission was paid, namely M/s.Suhani Traders.

14. Mr.Mistri highlighted the fact that although the receipt of commission by Weizmann group company is alleged, there is no merit whatsoever in the contention that could justify disallowance of the depreciation claim. The Tribunal found that there is no excessive payment. The Assessing Officer has not disputed the fact that the assessee paid lease rent of Rs.5,51,788/- to Weizmann group Ltd. on account of the windmills taken on lease and the contention of the Assessing Officer that lease rents were unreasonable was not based on any cogent material but only based

on assumption and presumption. In fact, the lease rents were fixed in accordance with the formula provided by Indian Renewable Energy Development, a Government of India Company which provided support to Electricity Project.

15. The Tribunal found that the Commissioner of Income Tax (Appeals) was justified in holding that there is nothing on record to prove the excessive amount of lease rent was paid. The said issue is identical in all appeals and the appeals came to be rejected while upholding the orders of the Commissioner of Income Tax (Appeals). The appeals filed for the year 2002-03 and 2005-06 were also dismissed. The cross objections filed by the assessee for the year 2002-03 were also rejected.

16. In the circumstances, having considered the finding of the two fact finding authorities, namely the Commissioner of Income Tax (Appeals) and the Tribunal, both of whom have come to an identical findings, we find no reason to interfere in the above appeal Nos.413, 458 and 449 of 2013. None of the three questions of law proposed arise from the present set of facts in these appeals.

17. In Income Tax Appeal Nos.1511/13 and 1713/13, the fourth question also does not arise. In fact, this issue was never raised before the Commissioner of Income Tax (Appeals) or before

the Tribunal. The Commissioner of Income Tax (Appeals) observed that the payment made to Weizmann group of is not in the nature of income but was expenditure reimbursed which cannot be regarded as a revenue receipt and therefore, the Tribunal considering the provisions of Section 194 of the Act has upheld the order of the Commissioner of Income Tax (Appeals) rejecting the contention of the department. In view of the same, the fourth question in Income Tax Appeal Nos.1511/13 and 1713/13 also does not raise as a substantial question of law.

16. Accordingly, all these appeals are rejected. There will be no order as to costs.

(A.K. MENON, J.)

(S.C.DHARMADHIKARI, J.)