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

INCOME TAX APPEAL NO.740 OF 2012

M/s. Crompton Greaves Limited ..Appellant
-*Versus*-
Assistant Commissioner of Income-Tax ..Respondent

....

Mr. Hiro Rai a/w Subhash Shetty i/b. Jitendra Singh for the Appellant.
Mr. Abhay Ahuja a/w Ms. Padma Divakar for the Respondent.

....

CORAM: S.C. DHARMADHIKARI
AND
A. A. SAYED, JJ.

DATE :- 13th NOVEMBER, 2014

P.C.:

The Assessee is in Appeal to challenge the order passed by the Income Tax Appellate Tribunal dated 8th February, 2012.

2] The Appeal was heard on 29th October, 2014 extensively and Mr. Rai appearing in support invited our attention to page 10 ground (C) of the Appeal paper book in Income Tax Appeal No.740 of 2012. After hearing both sides on 29th October, 2014, we passed the following order:-

> *"Mr. Rai, learned Counsel, appearing on behalf of the Assessee in support of these Appeals submits that he may be granted time to place on record factual materials to substantiate ground (c) at page 10 of Income Tax Appeal No.740 of 2012, equally he wants to place on record the orders of the Tribunal,*

earlier orders for prior assessment years of the Assessing Officer on the deduction claimed under section 35D of the Income Tax Act, 1961. At the request of Mr. Rai, we grant two weeks time. Let copies of these documents which are to be placed on record be supplied to Mr. Ahuja in advance so that he can take necessary instructions. In the event this material is not produced we would proceed on the footing that the attention of the Tribunal was not invited to the same."

3] Today, when the Appeal was listed for admission, the compilation of the orders passed by the Tribunal and the Assessing Officer of about 119 pages was tendered in both Appeals by Mr. Rai. Mr. Rai submits that the substantial questions of law and which have been formulated at page 7 and 8 of the paper book paragraph 3(a) to (e) are being raised because the Tribunal lost sight of firstly its own orders and for assessment years 1989-90, 1991-92 to 1997-98. Secondly, the Tribunal has passed an order in this case and which does not discuss the rival contentions completely. In fact, a gist of the contentions of both sides in relation to the specific ground is, what is noted by the Tribunal. Thereafter the elaboration thereof has not been completely noted. In such circumstances, the Assessee is unable to understand as to whether the materials which were placed on record of the Appeal before the Tribunal have been considered by the Tribunal and in their entirety. In the memo of Appeal, specific grounds were raised and of course in pleadings there is no elaboration required nor is the evidence required to be pleaded. Therefore, the arguments and the materials to support the arguments have to be necessarily placed at the time of arguments or oral submissions. That was done and hence, the compilation be taken on record and be read by this Court.

4] Mr. Ahuja, learned counsel, appearing on behalf of the Respondent-Revenue fairly states that the compilation has been served on the Revenue. However, he was unable to seek complete instructions on the contents of this compilation. Mr. Ahuja submits that without such instructions he would be able to canvas that the Appeal does not raise any substantial question of law. That would be the position even if the compilation is taken into consideration by this Court, therefore, really no prejudice would be caused if the compilation is accepted and read.

5] After hearing both sides on this point, we would not have ordinarily permitted such a course and as adopted by the Assessee in this case. The Assessee would have to satisfy the Court by way of a proper application and supported by his affidavit that a particular plea or argument was canvassed. The materials in support thereof were placed before the last fact finding authority, namely, the Income Tax Appellate Tribunal and that the Tribunal despite all this, omitted the same from its consideration and which has resulted in serious loss and prejudice. However, in the facts peculiar to this case and without this order being treated as a precedent in future cases, and considerable time having been spent by us on hearing the parties that we accept this compilation, the same is taken on record and marked "X" for identification.

6] In the light of the compilation being taken on record, we have extensively heard the counsel for both sides. We are of the view that the Appeal raises substantial questions of law. It is admitted on the following substantial questions of law:-

> "(a) Whether on the facts and in the circumstances of the case and in law, the Tribunal was justified in rejecting the Appellants claim for deduction of advertisement expenses of Rs.87,58,803/- on the ground that the same were prior years expenses?
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> (b) Whether on the facts and in the circumstances of the case and in law, the Tribunal was justified in reversing the decision of the Commissioner of Income Tax (Appeals) and coming to the conclusion that the Appellant is not entitled to deduction of Rs.53,74,474/- claimed under section 35D of the Act being 1/10th of the expenditure incurred on GDR issue?
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> (c) Whether on the facts and in the circumstances of the

case and in law, the Tribunal was justified in dismissing the Appellants claim for deduction of Rs.81,31,389/- being small debit balances written off as bad debts or alternatively as business expenditure?

(d) Whether on the facts and in the circumstances of the case and in law, though the Appellant had erroneously not pressed this ground, the Tribunal was justified in dismissing the Appellants claim for deduction of Rs.81,31,389/- being small debit balances written off as bad debts?

(e) Whether on the facts and in the circumstances of the case and in law, the Tribunal was justified in rejecting the Appellants claim for deduction of Rs.60,51,265/- under section 80-O of the Act?"

7] Mr. Rai would canvass a limited argument. His submission is that in rejecting the claim for deduction of advertisement expenses of Rs.87,58,803/- on the ground that the same were prior years expenses, the Tribunal omitted from consideration totally its own order passed in Income Tax Apeal No.8953/Bom/1992 for prior assessment years and in the very Assessee's case. The Tribunal had allowed this deduction. He has invited our attention to para 22 page 19 of the compilation which is a part of the order passed by the Tribunal for prior assessment years and which is dated 19th August, 2005.

8] He submits that the reasons of the Tribunal for the present assessment year would indicate that the Tribunal did not refer to the material in the form of its earlier orders. Such a course was, therefore, not permitted in law. In that regard, para 10 of the order passed by the Tribunal and impugned in this Appeal has been referred by Mr. Rai.

9] On the second question, termed as question (b) and which is claim under section 35D of the Act, our attention has been invited by Mr. Rai to section 35D and the order passed by the Tribunal with regard to this claim. It is urged that even with regard to this claim, the arguments were based on the deduction that the expenditure would be capital in nature. However, the deduction was claimed of $1/10^{th}$ of the Global Depository Receipts share issue expenses amounting to Rs.53,74,474/- for successive 10 years. This could not have been rejected by relying on the judgment of the Hon'ble Supreme court in the case of ***Punjab Industrial Development Corporation Ltd. V/s. Commissioner of Income Tax reported in (1997) 225 ITR 792 and Brooke Bond India Ltd. V/s. Commissioner of Income Tax reported in (1997) 225 ITR 798.*** Pertinently, the Assessee's claim was accepted by the Commissioner. The Tribunal according to Mr. Rai has relied upon a judgment of the Hon'ble Delhi High Court in the case of ***Commissioner of Income Tax V/s. Hindustan Insecticides Ltd. reported***

in (2001) 250 ITR 338. Our attention has been invited to that judgment by handing over a copy thereof and submitting that the said judgment had no occasion to deal with the deduction in terms of section 35D(2)(c)(iv) . The Appellant's claim arose out of this clause whereas the Delhi High Court considered the issue in the light of applicability of section 35D(2)(c)(iii). Therefore, even this question is a substantial question of law.

10] With regard to questions (c) and (d) Mr. Rai submits that an error committed by the authorize representative of the Assessee should not visit the Assessee with drastic consequences. The authorized representative bonafide believing that the claim for deduction of Rs.81,31,389/- (being small debit balances written off as bad debts or alternatively as business expenditure) did not press it because for a prior assessment year this was granted. The Tribunal erroneously held that it was not pressed and given up and, therefore, requires no determination. It was noticed by the Assessee's representative that there was a serious mistake committed. The Appeals for several years have been heard simultaneously and in other years, this claim had been allowed by the Assessing Officer while giving effect to the order of the Commissioner of Income Tax (Appeals). However, for this assessment year 1998-99 this claim had not been allowed. Therefore, though the Assessee was very much interested in prosecuting the claim and it is covered by a judgment of the Hon'ble Supreme Court in the case of ***TRF V/s. Commissioner of Income Tax reported in 323 ITR 397*** in favour of the Assessee an opportunity be given to correct this mistake and which has occurred bonafide to the Assessee. The Tribunal erroneously non-suited the Assessee on this ground. As far as question (e) is concerned namely, deduction under section 80-O of the Act, our attention is invited to the Tribunal order and it is submitted that the Tribunal mechanically followed the order passed for the prior assessment years. In the preceding year that deduction was not allowed because the ingredients of section 80-O were not satisfied and rather the Assessee failed to establish the same. However, in the present case, and for the subject assessment year, know-how in the form of designs, drawings, training etc. was imparted outside India and the technical know-how was in respect of various types of switchgears manufactured by the Assessee. The Assessee's collaborators had set up factories in Malaysia, Dubai to manufacture these products based on Assessee's know-how. The agreements were also produced on record but the Tribunal applied the reasoning for the prior assessment year and rejected the claim. Even here the distinguishing features were brought on record but omitted from consideration. Hence, this question is also a substantial question of law.

11] In relation to all the four questions, Mr. Ahuja submitted that this is nothing but an attempt to get over the factual findings and which bind the Assessee. There being no perversity pointed out an Appeal to this Court should not be utilized to remove the defects or lacunas in the stand taken before the Tribunal and on factual matters. That would be contrary to the settled cannons and would result in gross injustice as well. This Court, therefore, should not permit the Assesee to adopt a corrective course and at this belated stage.

12] Apart therefrom, Mr. Ahuja submits that in each of these questions, the Tribunal did not commit any error of law apparent on the face of the record or perversity. It has not omitted from consideration any material and which was indeed placed before it. This court cannot proceed on a guess work. There is nothing except the sheer guess of the Assesee that the Tribunal's order for prior assessment year in relation to the claim of advertisement expenses was placed on record. There is indeed no reference to this material in the Assessee’s arguments and, therefore Tribunal was not obliged to find out from the record any prior assessment orders. This ground, therefore, on merits also does not deserve to be entertained and the question is not a substantial question of law. On the other two grounds, it has been urged that Hon'ble Supreme court has already held in the case of Punjab State Industrial Development Corporation Limited and Brooke Bond India Limited (supra) that expenditure incurred by a company in connection with issue of shares with a view to increase its share capital is directly related to the expansion of the capital base of the company. It is a capital expenditure. Now, the Assessee should not be allowed to argue that the expenses in relation to foreign currency with public subscription of shares or debentures of the company or Global Depository Receipts be permitted to be amortized, now, section 35D cannot be relied upon. Even otherwise, the judgment of the Hon'ble Delhi High Court concludes the issue. There are other orders as well. In such circumstances, the Tribunal's order should not be interfered and the Appeal does not raise any substantial question of law. In relation to the question where the claims were given up and in relation to small debit balances written off as bad debts, the Assesse is now trying to get over a concession and which was voluntarily made before the Tribunal. The Assesse cannot be allowed to approbate and reprobate. This cannot be said to be an error or mistake and when Tribunal's orders are the basis on which this concession is given. Having realized that the assessment order in relation to some other years grants the claim, the Assesse is now claiming the re-hearing on this ground or question, that should not be permitted. Even on merits, the Tribunal's order in this case cannot be termed as perverse.

13] On the deduction under section 80-O of the Act is concerned, our attention is invited by Mr. Ahuja to the reasoning of the Tribunal and it is a factual finding. According to Mr. Ahuja there is no evidence to indicate that the earlier agreements were altered or modified or that the collaborators of the Assesse having set up factories in Malaysia and Dubai that the brand or trade mark was used there. The Tribunal's findings cannot be termed as perverse. He relied upon para 25 of the Tribunal order in this regard. Mr. Ahuja, therefore, submits that the Appeal be dismissed.

14] Having heard both sides and extensively we are of the view that the substantial questions of law being raised, even if the Appeal is admitted it need not be kept on file as that serves no purpose. Though Mr. Ahuja has no instructions to concede to any order of remand, yet, we are of the view that no prejudice will be caused to the revenue if a limited remand is ordered.

15] We are satisfied that in relation to the deduction of advertisement expenses, namely, the first substantial question of law, Tribunal order dated 19th August, 2005 for assessment year 1989-90, 1991-92 to 1997-98 referred to this very claim. It also refers to the argument of the departmental representative and the representative of the Assessee. It refers to the findings of the Assessing Officer rendered for those assessment years. It also refers to the order of the Commissioner of Income Tax (Appeals) allowing this expenditure following his order for earlier years. It then observes and holds that "we do not find any inconsistency or illegality in the approach of the Assessee. When the bills are received in the current year, the expenditure would arise to the Assessee in the current year." Holding further that the method of accounting is consistent in these years and which is accepted by the department, the Tribunal concluded that there is no reason to take a different view.

16] Had these orders been noticed by the Tribunal, the Tribunal may have had to record a further finding as to whether any distinction or difference being brought on record for the years that are covered by the prior order and for the subject assessment year, namely, assessment year 1998-99. The Tribunal in relation to this very Assesssee having taken this view ought to have, therefore, and to render complete justice called for the records, if, at all they were incomplete and referred to these orders. We are of the view that the compilation having been taken on record by us, it would be fair, just and proper to set aside the Tribunal's order on this ground and grant the Assessee an opportunity of raising this plea before the Tribunal again and producing all the materials relevant to the claim including the compilation of orders which has been placed before us. We would not express any opinion one way or the other on this deduction. Each of the contentions are, therefore, kept open for being raised. It is for the Tribunal to decide as to whether its findings for the assessment years covered by its order dated 19th August, 2005 can be of any assistance to the Assessee for the subject assessment year. It is for the Assessee to establish and demonstrate that the bills have been received in the subject assessment year and the claim of the advertisement agencies towards the expenses were crystallized in terms of the Division Bench order which has been relied upon before us by Mr. Rai. A Division Bench of this Court in the case of ***Commissioner of Income Tax-10, Mumbai V/s. Mahanagar Gas Limited in Income Tax Appeal No.1978 of 2011*** decided on 10th June, 2013 has been relied upon . The Tribunal will also decide after taking into consideration the judgment of this Court as to whether any benefit can be derived by the Assesee in terms thereof. All such and connected issues are, therefore, kept open.

17] As far as the claim of the Assessee and towards the deduction under section 35D is concerned, we have perused the relevant paragraphs in the impugned order of the Tribunal. We find that the Assesee has not proceeded on the footing that the expenditure is of revenue nature. The claim was not as much as in connection with section 37 of the Income Tax Act but on applicability of section35D(2)(c)(iv) thereof. In such circumstances, to our mind, the Tribunal should have adverted to the relevant material and merely applying the ratio in the Division Bench judgment of the High Court of Delhi would not suffice. In the case before the Delhi High Court in Commissioner of Income Tax V/s. Hindustan Insecticides Ltd. (supra) the expenditure was claimed to be deductible under section 35D(2)(c)(iii) of Income Tax Act. We are not at all satisfied with the cryptic and short reasons assigned. In such circumstances, we are of the opinion that even on this point, the impugned order deserves to be quashed and set aside.

18] Now, what remains is the third question and which is pertaining to the claim of the Assessee for deduction of Rs.81,31,389/- being small debit balances written off as bad debts or alternatively as business expenditure. True, it is that the Tribunal has recorded that in so far as this deduction is concerned, the same is not pressed but having noted the rival contentions, we are of the opinion that the Assessee deserves an opportunity to establish and prove this claim. That opportunity has been lost not for any fault of the Assessee but because of the mistake committed by its authorized representative. It is in these circumstances that we find that the Assessee should be permitted to raise this issue again. It is in the peculiar circumstances and which is to be found in this case only that we are issuing such a direction. It is not to cover up any lapse or defect committed by the Assessee but it is because of the erroneous understanding of the issue by its authorized representative that we are granting such an opportunity. Hence, the Tribunal will have to deal with this claim unmindful of and without being influenced with what is held by it in para 16 of the impugned order. The Assessee has specifically raised the issue and on the footing that it has not got complete relief in earlier proceedings. We permit both sides to place their version before the Tribunal once again.

19] As far as the last deduction is concerned and that is of Rs.60,15,265/- under section 80-O of the Act, we have carefully considered the contentions of both sides. We have perused the order passed by the Tribunal and relevant to this extent and claim. The Tribunal has in para-24 and 25 of the order under challenge found that beyond placing the agreements and particularly with a party in Malaysia dated 17th November, 1995, the proof or evidence of use of the patent by the collaborators and outside India was not placed before the authorities. The Tribunal has held that no further evidence is placed on record to indicate that earlier agreements were altered or modified. Beyond the agreements for setting up of factories by collaborators abroad, nothing has been placed before the Tribunal which would enable it to conclude that the ingredients of section 80-O have been satisfied. We do not see how such an approach of the Tribunal can be said to be perverse or vitiated by any error of law apparent on the face of the record. The Tribunal as also the Assessing Officer ought to be satisfied that the gross total income of the Assessee, being an Indian Company, or a person, other than a company, who is resident in India includes any income received by the Assessee from the Government of a Foreign State or foreign enterprise in consideration for the use outside India of any patent, invention etc. and only, then, this deduction can be granted. The Appeal is dismissed to that extent.

20] As a result of the above discussion, we partly allow this Appeal. The order passed by the Tribunal in the subject Appeals of the Assessee-Revenue, namely, in Income Tax Appeal No.3526 and 3541/Mum/2002 is quashed and set aside to the above limited extent. The Appeal is restored to the file of the Tribunal for decision afresh on the deductions that have been claimed by the Assessee towards advertisement expenses of Rs.87,58,803/-, Rs.53,74,474/- under section 35D of the Income Tax Act and deduction of Rs.81,31,389/- being small debt balance written off as bad debts and alternatively as business expenditure shall have to be re-examined by the Tribunal. These questions or issues must be reconsidered by the Tribunal afresh on merits and in accordance with law after taking into consideration all the relevant materials and arguments of both sides. The Appeals will be re-heard and decided by a fresh order uninfluenced by any previous observations and conclusions by the Tribunal and expeditiously.

21] The opportunity of re-hearing of these Appeals has been granted in this case in peculiar facts and circumstances. It is allowed partly because of the Assessee that the remand had to be directed and a fresh hearing. In such circumstances, had the Assessee been vigilant in placing all the facts and circumstances and relevant material on the file and inviting the attention of the Tribunal to it, possibly all this could have been avoided. The delay in disposal and finalization of such issues has revenue implications can affect larger public interest. In these circumstances, there would be an order imposing costs on the Assessee to the extent of Rs.50,000/-. The costs be paid to the Revenue within a period of six weeks from the date of receipt of copy of this order.

(A. A. SAYED, J.) **(S.C. DHARMADHIKARI, J.)**

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