Chief Justice's Court

Case :- INCOME TAX APPEAL No. - 119 of 2014

Appellant :- M/S J.K. Cement Limited
Respondent :- The Commissioner Of Income Tax -II
Counsel for Appellant :- R.S. Agrawal
Counsel for Respondent :- C.S.C., It, Ashok Kumar

With

Case :- INCOME TAX APPEAL No. - 120 of 2014

Appellant :- M/S J.K. Cement Limited
Respondent :- The Commissioner Of Income Tax -II
Counsel for Appellant :- R.S. Agrawal
Counsel for Respondent :- C.S.C., It, Ashok Kumar

With

Case :- WRIT TAX No. - 546 of 2014

Petitioner :- M/S J.K. Cement Ltd.
Respondent :- Income Tax Appellate Tribunal, Lucknow Bench And Another
Counsel for Petitioner :- R.S. Agrawal
Counsel for Respondent :- C.S.C.(I.T)

With

Case :- WRIT TAX No. - 547 of 2014

Petitioner :- M/S J.K. Cement Ltd.
Respondent :- Income Tax Appellate Tribunal, Lucknow Bench And Another
Counsel for Petitioner :- R.S. Agrawal
Counsel for Respondent :- C.S.C.(I.T)

Hon'ble Dr. Dhananjaya Yeshwant Chandrachud, Chief Justice
Hon'ble Dilip Gupta, J.

Both these appeals by the assessee arise from a common order of the Income Tax Appellate Tribunal[1] dated 28 February 2014 for assessment years 2005-06 and 2006-07. The following questions of law have been formulated in support of the appeal :-

"A. Whether on the facts and in the circumstances of the case

1. Tribunal

the ITAT was legally correct in reversing the order passed by the CIT (A) and restoring that of AO, without adjudicating and deciding the specific grounds taken by the Revenue in their grounds of appeal nos.1, 2 and 3, involving the basic and real controversy in the appeal.

B. Whether on the facts and circumstances of the case the ITAT erred in not appreciating the written submissions of the appellant, as well as the material on record substantiating that the appellant company had rightly and legally claimed the extra depreciation of Rs.94,27,541/- by allocating the value of shares amounting to Rs.7,42,69,500/- issued to the shareholders of M/s J.K. Synthetics Limited, to the cost of the fixed assets acquired by the appellant company from M/s J.K. Synthetics Limited.

C. Whether on the facts and circumstances of the case the Tribunal has failed to appreciate that the appellant had also taken over the trade mark of the Cement Division of JKSL and the goodwill attached to the trade mark, being an intangible asset within the meaning of section 32(I), (II) of the Act and the depreciation is allowable over the same as prescribed in Appendix 1 to the I.T. Rules, 1962. As such alternatively, if the stand of the Revenue is accepted that the amount of Rs.7,42,69,500/- is in respect of the goodwill, even then, the appellant is legally entitled for the extra depreciation of the amount as claimed by it in the revised return.

D. Whether on the facts and circumstances of the case, the appellant, having acquired the business of M/s J.K. Synthetics Limited as a going concern including movable and immovable assets, the Tribunal has failed to record a finding that the appellant-company could legally claim depreciation on fixed assets arising on allocation of cost of equity shares issued in the ratio of 1:10 to the shareholders of M/s J.K. Synthetics Limited.

E. Whether the concept of “going concern” being inclusive of the shareholdings too and the acquisition having taken place pursuant to the scheme approved by the Appellate Authority for Industrial and Financial Reconstruction (AAIFR) and the same having a statutory force, the authorities below could not have rejected the claim of the appellant Company for depreciation as shown in the revised return.

F. Whether the term “goodwill” having been used by the appellant Company in consonance with the term used by the AAIFR in its order approving the rehabilitation scheme, the same cannot detract from the true nature of the cost incurred by the appellant Company by way of issue of shares, allocating thereof to fixed assets and its entitlement to depreciation in accordance with clause (b) of explanation (iii) of section 32 (1) of the Act.

G. Whether the Apex Court, having held in the case of Commissioner of Income Tax Vs. Smifs Securities Limited (2012 (SC)348, ITR 302) that the term “any other business or commercial rights of similar nature” as used in the aforesaid provision, would include even goodwill, the claim for depreciation, even on the ground of goodwill, was clearly allowable;

H. Whether the Tribunal, without appreciating the material on record properly, was legally correct in coming to the conclusion that when as per the Balance Sheet, the value of post acquisition assets was shown at Rs.56762.41 lacs, it could not go up for depreciation purpose.

I. Whether the Tribunal, having failed to decide the basic issues raised before it on merits, the order passed by it is clearly illegal and unsustainable."

The assessee, which is a public limited company, acquired the cement undertakings of J.K. Synthetics Limited[2] as a going concern with effect from 4 November 2004 in pursuance of an order of the Appellate Authority for Industrial and Financial Reconstruction[3] dated 23 January 2003. JKSL had been declared as a sick company by the Board for Industrial and Financial Reconstruction[4] on 2 April 1998 and Industrial Development Bank of India[5] was appointed as an Operating Agency. A draft rehabilitation scheme was circulated, which envisaged the transfer of cement undertakings of the sick company to the assessee on the payment of the outstanding dues of the financial institutions and banks as consideration for the transfer. The scheme which was sanctioned by the AAIFR defined the expression 'Demerger' to mean the transfer by a slump sale through vesting under Section 18(6A) of the Sick Industrial Companies (Special Provisions) Act, 1985[6]. The cost of the scheme was shown in Clause 'C' to be Rs.510.39 crores including the issuance of equity shares of the assessee to the existing shareholders of JKSL in the amount of Rs.7.44 crores. The means for financing the cost of

2. JKSL
3. AAIFR
4. BIFR
5. IDBI
6. SICA

the scheme, included goodwill in the cement undertaking for allotment of equity shares of the assessee to the existing shareholders of JKSL of Rs.7.44 crores. Clause 'E' of the scheme, which was titled 'Rehabilitation Strategy', provided that the demerger of the cement undertaking of JKSL into the assessee was as a 'going concern' on as-is-where-is basis including all fixed assets and current liabilities and is as follows:-

> "(b) The demerger of the cement undertaking of JKSL into JKCL is as a 'going concern' on as-is-where-is-basis, free from encumbrances which inter-alia includes all fixed assets, current assets, intangible assets, all rights, patents, trade mark, mining lease etc. and all current liabilities including trade deposits, workers' dues, contingent liabilities and all litigation with respect to the cement undertaking."

Clause H (e) of the scheme contemplated that the assessee would issue one paid up equity share of a face value of Rs.10/- free of cost to all the existing shareholders of JKSL against 10 equity shares of JKSL held by them.

The assessee, in its original return, claimed depreciation of Rs.72,32,58,987/-. The assessee, however, filed a revised return enhancing the claim of depreciation to Rs.73,26,86,528/-. Consequently, an additional amount of depreciation of Rs.94,27,541/- was claimed. According to the assesssee, the scheme envisaged the allotment of equity shares to the shareholders of JKSL, which was debited to the goodwill account in the books of the assessee. The assessee submitted that the aforesaid amount of Rs.7.43 crores forms part of the purchase consideration and depreciation was allowable on it.

The Assessing Officer, by his order dated 26 December 2007 under Section 143(3) of the Income Tax Act, 1961[7] declined to allow the enhanced claim of depreciation and restricted the quantum of depreciation to the amount of Rs.72,32,58,987/-, as claimed in the original return.

In appeal, the Commissioner of Income Tax (Appeals)[8] by an order dated 7 May 2010 reversed the order of the Assessing Officer on this aspect on the ground that the issuance of shares was towards part payment of the purchase consideration and hence was included in the cost of acquisition of the cement undertaking. The CIT (A) held that the assessee could not be deprived of depreciation by merely treating the issue of shares to the goodwill account. In the alternate, the CIT (A) held that even if it was paid for the purchase of goodwill, this payment could be considered as a payment for acquiring brands of the demerged company upon which depreciation was allowable under Section 32 of the Act.

In an appeal by the Revenue, the Tribunal set aside the order of the CIT (A) with the following observations :-

> "We have considered the rival submissions. As required by the bench in the course of hearing, the learned AR of the assessee

7. the Act
8. CIT(A)

has submitted a copy of Balance Sheet as on 04.11.2004 with figures of assets and liabilities on that date being pre acquisition and post acquisition. As per the same, pre acquisition Fixed assets were nil and post acquisition fixed assets are shown at Rs.56762.41 lacs and capital work in progress at Rs.1423.60 lacs. Depreciation is not allowable on capital work in progress. So, maximum depreciation allowable is on assets of Rs.56762.41 lacs. As per original chart of depreciation available on page 58 of the paper book, depreciation is calculated on assets of Rs.567,62,40,544.27 with amount of depreciation of Rs.72,32,58,987. But on page 59 of the paper book in the revised depreciation chart, the assessee has taken the value of asset at Rs.575,05,10,044.63 with amount of depreciation of Rs.73,26,86,528.73. We fail to understand that when as per the balance sheet, the value of post acquisition assets is shown at Rs.56762.41 lacs, how it can go up for depreciation purpose. Therefore, in our considered opinion, maximum depreciation allowable is on assets of Rs.56762.41 lacs, which is already allowed by the A.O. also. Extra depreciation allowed by the learned CIT (A) is not sustainable in view of the facts of the present case as discussed above. Since our decision is on the basis of the facts of the present case and the A.O. has allowed the maximum depreciation allowable on the post acquisition assets as per balance sheet submitted before us. The judgments cited by both sides have no relevance in the facts of the present case. Hence, the order of learned CIT (A) is reversed on this issue and that of the A.O. is restored in both years.**”**

The assessee filed an application under Section 254(2) of the Act for rectification of the order of the Tribunal. By an order dated 7 August 2014, the Tribunal dismissed both the rectification applications against which two writ petitions have been filed.

At the outset, we may note that a preliminary objection has been taken by the learned Senior Counsel for the Revenue to the maintainability of the writ petitions on the ground that an appeal would lie before the High Court under Section 260(A) of the Act against every order of the Tribunal passed under Section 254(2) of the Act. In this behalf, reliance has been placed on the judgment of Hon'ble Mr. Justice H.L. Dattu, as His Lordship then was in the Karnataka High Court, in **L. Sohanraj and Others Vs. Deputy Commissioner of Income Tax and Another**[9] and on a judgment of the Division Bench of the Karnataka High Court affirming that view in **L. Sohanraj and Others Vs. Deputy Commissioner of Income Tax and Another**[10].

Now, at the outset, it would be necessary to note the grounds which have been formulated in support of the appeal. Ground A relates to the correctness of the order passed by the Tribunal under Section 254(2) of the Act. An amendment application has also been filed for challenging the said order. Grounds B, C, D, E, F, G, H and I essentially seek an evaluation by this Court on the merits of the claim for depreciation. On a plain reading of the impugned order, it appears that the Tribunal has not dealt with the merits

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9. (2003) 260 ITR (Karn.) 147
10. (2003) 260 ITR (Karn.) 155

of the claim, which admittedly, is conceded by both the assessee and the Revenue. The only ground which has weighed with the Tribunal is that there was no basis for the assessee to file a revised return enhancing the value of the fixed assets.

On behalf of the assessee, it has been submitted that in the return as originally filed, depreciation was calculated on assets of Rs.567.62 crores. However, a revised return was filed after the allotment of shares valued at Rs.7.44 crores (the date of allotment being 10 March 2005), as a result of which, the value of the fixed assets increased to Rs.575.05 crores, according to the assessee. The submission is that there was no reason or basis for the Tribunal not to allow the claim for depreciation and to allow the appeal of the Revenue merely on the ground that the value of the fixed assets had increased in the revised return from Rs.567.62 crores to Rs.575.05 crores. Reliance has been placed on the definition of the expression 'demerger' under Section 2(19AA) of the Act, which includes in Clause (iv), the issuance of shares in consideration of the demerger by the resulting company to the shareholders of the demerged company.

On the other hand, it has been urged on behalf of the Revenue that the scheme defines the expression 'demerger' to mean a transfer by way of a slump sale through vesting under Section 18(6A) of the SICA. Reliance has been placed on the provisions of Section 18(6A) of the SICA which reads as follows :-

> **"**(6A) Where a sanctioned scheme provides for the transfer of any property or liability of the sick industrial company in favour of any other company or person or where such scheme provides for the transfer of any property or liability of any other company or person in favour of the sick industrial company, then, by virtue of, and to the extent provided in, the scheme, on and from the date of coming into operation of the sanctioned scheme or any provision thereof, the property shall be transferred to and vest in, and the liability shall become the liability of such other company or person or as the case may be, the sick industrial company.**"**

In the present case, it has been submitted that the scheme contemplates, in Clause E (b), the demerger of the cement undertaking as a going concern and to include not only the fixed assets but all current liabilities and contingent liabilities as well. Hence, the cost of the scheme is shown to include the issuance of equity shares valued at Rs.7.44 crores to the shareholders of the demerged company. In this regard, reliance has been placed on the decision of the Supreme Court in **Commissioner of Income Tax Vs. Hoogly Mills Co. Ltd.**[11]**,** where it was held that the claim for depreciation on account of gratuity was not allowable under Section 32 of the Act, because it was neither a tangible nor intangible asset as defined in Explanation 3.

We have considered the rival contentions which have been urged on behalf of the assessee and the Revenue on the merits of the claim for

11. [2006] 287 ITR 333 (SC)

depreciation under Section 32 of the Act. Ex facie, it is clear from reading paragraph 7 of the impugned order that the Tribunal has not applied its mind to the merits which are now sought to be canvassed in questions B to I, which have been formulated in support of the appeal by the assessee. The only point which weighed with the Tribunal was that once the post-acquisition assets were shown at Rs.567.62 crores, there was no basis for enhancing the value to Rs.575.05 crores in the revised return.

In our view, the issues which have been raised on behalf of the assessee as well as the submissions which have been urged on behalf of the Revenue would merit a primary determination by the Tribunal and it would not be appropriate or proper for this Court to express a finding in the absence of a considered decision of the Tribunal. In essence, the questions of law which have been raised on behalf of the assessee would require consideration by the Tribunal. The Tribunal has not made any finding on the merits of the issues which are sought to be raised in the appeal.

During the course of the hearing, the learned counsel appearing on behalf of the revenue also submitted that it would not be appropriate and proper for this Court to express a determination on the issues raised in the absence of a finding thereof by the Tribunal. We respectfully concur with that submission.

For these reasons, we are of the view that it would be appropriate and proper to restore the proceedings back to the Tribunal for a decision afresh on the appeals for AYs 2005-06 and 2006-07. The Tribunal shall decide the issue afresh after hearing the parties.

In this view of the matter, the writ petitions filed by the assessee challenging the order passed under Section 254(2) of the Act will not survive. In the circumstances, it is not necessary for this Court to express any view on the objections which were raised on behalf of the Revenue to the maintainability of the writ petitions under Article 226 of the Constitution since the petitions have been rendered infructuous.

It is also not necessary for the Court to answer the questions of law as formulated which are kept open for adjudication by the Tribunal.

The appeals and the writ petitions are, accordingly, disposed of. There shall be no order as to costs.

Order Date :- 9.9.2014
VMA

(Dr. D.Y. Chandrachud, C.J.)

(Dilip Gupta, J.)

<u>Chief Justice's Court</u>

Civil Misc. (Amendment Application) No.284446 of 2014
In re :
Case :- INCOME TAX APPEAL No. - 119 of 2014

Appellant :- M/S J.K. Cement Limited
Respondent :- The Commissioner Of Income Tax -II
Counsel for Appellant :- R.S. Agrawal
Counsel for Respondent :- C.S.C., It,Ashok Kumar

<u>Hon'ble Dr. Dhananjaya Yeshwant Chandrachud,Chief Justice</u>
<u>Hon'ble Dilip Gupta,J.</u>

In view of the order passed on the appeal, no order is required to be passed on this application.

Order Date :- 9.9.2014
VMA

(Dr. D.Y. Chandrachud, C.J.)

(Dilip Gupta, J.)