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

INCOME TAX APPEAL NO.987 OF 2000

The Commissioner of Income Tax,
Central III, Mumbai. ...Appellant.
Vs.
M/s.Virendra & Co.,
274, New Darukhana, Mumbai-400010, ...Respondent.

Mr. D.K.Kamwal for the Appellant.
Mr. K.Shivaram along with Mr. Ajay Singh, Ms. Renu Choudhari i/by K.Gopal & P.K.Parida for the Respondent.

CORAM : S.J.VAZIFDAR &
M.S. SANKLECHA, JJ.

DATE : 20th July, 2012

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

This appeal by the revenue under section 260A of the Income Tax Act, 1961 (hereinafter referred to as the "said Act") seeks to challenge the order dated 28th January, 2000 of the Income Tax Appellate Tribunal (hereinafter referred to as the "ITAT") relating to Assessment Year 1986-87. This appeal was admitted on 27th June, 2005 by this court on the following substantial questions of law.

1 Whether on the facts and in the circumstances of the case and in law, the ITAT was justified in deleting the addition of Rs.21,08,457/- having accepted that ins the line of business carried

on by the assessee, generation of scrap was always determined by the type of vessel borken by the assessee and in the absence of documentary evidence and records, the assessee's contentions with regard to the generation of non ferrous scrap could not be accepted?

2 Whether in the facts and in the circumstances of the case and in law, the ITAT was justified in deleting the addition of Rs.21,08,4578/- when the Assessing officer had made the addition on the basis of the report of a Committee appointed by the Ministry of Steel and Mines and was backed by cases engaged in the similar line of business?

3 Whether on the facts and in the circumstances of the case and in law, the ITAT was justified in deleting the addition of Rs.21,08,457/- without bringing on record details and documentary evidences to show that the condition of the ships broken by the assessee justified the generation of scrap at 0.81% only?

2 Brief facts leading to this appeal are as under:

a) The respondent-assessee carries on business of ship breaking. In its return of income filed for the Assessment Year 1986-87 the respondent had claimed that scrap

generated and sold from the breaking of ships was in the aggregate of 7144 metric tons and out of which 0.81% i.e. 57.95 metric tons was non ferrous metal. The Assessing officer while determining the respondent's income for the Assessment Year 1986-87 by an order dated 30th March, 1989 was of the view that the non ferrous metal which was generated and sold was 2% of the total recovery of scrap i.e. 142.88 metric tons and for this purpose the Assessing officer relied upon the scrap generated by the three other ship breaking units being assessed by him. Consequently, the Assessing Officer concluded that the excess non ferrous metal as determined by him had been sold generating an income of Rs.21.08 lacs which had not been disclosed. This amount of Rs.21.08 lacs was added to the respondent-assessee's income as income from undisclosed sources.

b) The Commissioner of Income Tax (Appeals) by an order dated 3rd August, 1990, upheld the order of the Assessing officer.

c) The ITAT by its order dated 20th January,2000 allowed the respondent's appeal. The ITAT held that there cannot be any standard measure of generation of scrap while carrying out the activity of ship breaking. This is because generation of scrap would always depend upon the type of the vessel being broken. In the circumstances, there cannot be any objective standard. Further, the ITAT also held that the cases of other ship breakers being relied upon by the

Assessing officer to conclude that generation of non ferrous scrap is in excess of 2% cannot be relied upon as the same was never put to the respondent-assessee so as to enable the respondent assessee to deal with the same.

3) The ITAT on the basis of the evidence before it has come to the conclusion that 0.81 % of the total recovery being attributed to non ferrous scrap generated during the course of ship breaking by the respondent assessee was correct. It is pertinent to note that the respondent assessee had maintained excise record and its books were audited and the department does not challenge the purchases and sales reflected in the respondent's books of accounts. It is important to note that between 0.90% to 1.40% of non ferrous scrap being generated out of the total scrap on the activity of ship breaking has been accepted by the department upto the Assessment Year 1990-91.The Advocate for the respondent-assessee points out that even for subsequent assessment years 1992-93 to 1996-97, generation of non ferrous scrap at 0.81% had been accepted by the department.

4) The finding of the ITAT is one of fact and the same cannot be said to be perverse. No substantial question of law therefore, arises for the determination by this Court.

5) It must also be pointed out that though we have dismissed the appeal filed by the Revenue on merits, the appeal itself would not be entertainable as the tax effect in the present appeal would be only Rs.5.69 lacs. The appeal was filed in June, 2000. Our Court in the matter of **CIT Vs. Vijay V.Kavekar in Income Tax Appeal No.78 of**

2007 dated 29th July, 2011 held that the CBDT Circular No.2/2011 issued on 9th February 2011 directing the Revenue not to file appeals under Section 260A in cases where the tax effect is less than Rs.10/- lacs. The said circular has retrospective effect and would also apply in respect of pending appeals. Consequently, the appeal would also not be entertained on the ground that the tax effect is less than Rs.10/- lacs.

6) Appeal is dismissed. No order as to costs.

(M.S. SANKLECHA, J.) **(S. J. VAZIFDAR, J.)**