

IN THE HIGH COURT OF KARNATAKA AT BENGALURU

DATED THIS THE 24TH DAY OF JUNE 2020

PRESENT

THE HON'BLE MR. JUSTICE ALOK ARADHE

AND

THE HON'BLE MR. JUSTICE M.NAGAPRASANNA

I.T.A. NO.420 OF 2012

BETWEEN:

1. THE COMMISSIONER OF INCOME-TAX
LTU, JSS TOWERS, BSK III STAGE
BANGALORE.
 2. THE ADDL. COMMISSIONER OF INCOME-TAX
RANGE-8(1), MUMBAI.
 3. JOINT COMMISSIONER OF INCOME-TAX
LTU, JSS TOWERS, BSK III STAGE, BANGALORE.
- ... APPELLANTS

(By Sri K V ARAVIND ADV.,)

AND:

M/S. ASEA BROWN BOVERI LTD.,
22A, SHAH INDUSTRIAL ESTATE
OFF VEERA DESAI ROAD
ANDHERI, MUMBAI
PAN NO.AAACA3834B.

... RESPONDENT

(By Sri. T SURYANARAYANA, ADV A/W V VINAY GIRI, ADV.)

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THIS ITA IS FILED UNDER SECTION 260-A OF I.T. ACT,
1961 ARISING OUT OF ORDER DATED 25/05/2012 PASSED IN ITA

NO.6612/MUM/2002, FOR THE ASSESSMENT YEAR 1995-96, PRAYING THAT THIS HON'BLE COURT MAY BE PLEASED TO:

(I) FORMULATE THE SUBSTANTIAL QUESTIONS OF LAW STATED THEREIN.

(II) ALLOW THE APPEAL AND SET ASIDE THE ORDERS PASSED BY THE ITAT BEARING ITA NO.6612/MUM/2002 DATED 25/05/2012 AND CONFIRM THE ORDER OF THE APPELLATE COMMISSIONER CONFIRMING THE ORDER PASSED BY THE DEPUTY COMMISSIONER OF INCOME TAX, SPECIAL RANGE-1, MUMBAI.

THIS ITA COMING ON FOR FINAL HEARING, THIS DAY, **ALOK ARADHE J.**, DELIVERED THE FOLLOWING:

JUDGMENT

This appeal under Section 260A of the Income Tax Act, 1961 (hereinafter referred to as the Act for short) has been preferred by the revenue. The subject matter of the appeal pertains to the Assessment year 1995-96. The appeal was admitted by a bench of this Court vide order dated 23.01.2013 on the following substantial questions of law:

- (i) *Whether the tribunal was correct in holding that the travel expenses incurred by employees of the assessee computed based on average basis should be upheld and not on trip wise basis as contemplated under Rule 6D of*

the I.T. Rules as held by jurisdictional Bombay High Court as the order was passed by the assessing officer in Mumbai?

- (ii) Whether the Tribunal was correct in holding that cash compensatory assistance and duty drawback is liable to tax on receipt basis and not on the accrual basis contrary to the view expressed by it in the case of the assessee for the Assessment year 1994-95 and recorded a perverse finding?*
- (iii) Whether the tribunal was correct in holding that the payments made by the assessee in cash exceeding Rs.10,000/- cannot be disallowed by applying Section 40(A)(3) of the Act, as the same were paid in exceptional circumstances when the exceptions claimed by the assessee does not fall under Rule 6 DD (j) of the Rules and recorded a perverse finding?*

- (iv) *Whether the tribunal was correct in holding that the interest received on bank deposits, interest from employees and customers, commission income, rental income, commission income on technical services cannot be reduced by 90% when computing profits of business as per Explanation (baa) to Section 80HHC of the Act, despite this income having not been earned in the course of export and when the details of the same had not been furnished by the assessee?*
- (v) *Whether the tribunal was correct in holding that net interest income should be reduced by 90% when computing profits of business for the purpose of allowing deduction under Section 80HHC of the Act and not gross interest income?*
- (vi) *Whether the tribunal was correct in holding that the income from technical services cannot be reduced by 90% when computing profits of business as*

per Explanation (baa) to Section 80HHC of the Act, despite this income having not been earned in the course of export and when the details of the same had not been furnished by the assessee?

(vii) Whether the tribunal was correct in holding that Rs.8,84,75,000/- being customs duty paid and included in the closing stock is allowable in view of Section 43B of the Act, when the same was not verified by the assessing officer as it was not claimed in the return of income or in the revised return as held by the Apex Court in M/s Goetze India Ltd., vs. CIT (2006 204 CTR (SC) 182?

(viii) Whether the tribunal was correct in holding that order under Section 201(1) is mandatory for levying of compensatory interest under Section 201(1A) of the Act, for delay in remittance of TDS deducted?

2. Facts leading to filing of the appeal briefly stated are that the assessee filed return of income on

30.11.1995 declaring an income of Rs.55,60,86,982/-, which was accompanied by an audited profit and loss account, balance sheet and tax audit report in Form 3CD. It was processed under Section 143(1) and an intimation was issued on 29.03.1996. The assessing officer by an order dated 28.02.1998 inter alia held as under:

- (i) The assessee had aggregated all the trips made by various employees. In accordance with Rule 6D of the Income Tax Rules, the computation has to be made trip basis of each employee. Therefore, a sum of Rs.94,912/- was disallowed.
- (ii) The assessee had not declared cash compensatory assistance and duty drawback on the ground that same is liable to tax on receipt basis. The assessing officer rejected the same and included in the total income on accrual basis and completed the assessment.

- (iii) The assessee paid a sum exceeding Rs.10,000/- in cash to various parties. In all, a sum of Rs.1,87,442/- was paid and no evidence was adduced by the assessee for exceptional circumstances to attract Rule 6DD(j) of the Rules and was disallowed under Section 40(A)(3) of the Act.
- (iv) The assessing officer held that 90% of the interest received on bank deposits, interest from employees and customers, income from commission, rental income, income on commission from technical services has been excluded for the purposes of computing profits of the business as per Explanation (baa) to Section 80HHC of the Act.
- (v) The claim with regard to a sum of Rs.8,84,75,000/-, which was claimed as custom duty paid and included in closing stock and was made by way of rectification application was rejected.

- (vi) The assessee deducted Tax at Source and the same was not remitted within the due date. Therefore, assessing officer levied compensatory interest for delay in remittance under Section 201(1A) of the Act.

3. Being aggrieved, the assessee preferred an appeal before the Commissioner of Income Tax (Appeals). The Commissioner of Income Tax (Appeals) by an order dated 27.09.2008 upheld the finding of the assessing officer insofar as it pertains to disallowance of a sum of Rs.94,912/- as the expenses were not incurred trip wise as per Rule 6D of the Rules. The finding of the assessing officer that a sum of Rs.1,59,99,078/- of a Cash Compensatory Assistance and duty drawback is liable for tax on accrual basis was also upheld. The disallowance of claim under Section 40(A)(3) of the Act was also upheld. The finding with regard to allowing deduction under Section 80HHC of the Act was upheld. In the result, the appeal was dismissed.

4. The assessee filed an appeal before the Income Tax Appellate Tribunal. The tribunal by an order dated 25.05.2012 inter alia held that travel expenses should be computed on average basis and not trip wise basis by placing reliance on a decision rendered by a bench of this court. It was also held that finding with regard to cash compensatory assistance and duty drawback is contrary to the view expressed by the tribunal in case of assessee for Previous year 1994-95. It was also held that payment of cash exceeding Rs.10,000/- were made in exceptional circumstances and the same were admissible. It was also held that no part of income for technical services be excluded for computing deduction under Section 80HHC of the Act. It was further held that claim of Rs.8,84,75,000/- being custom duty paid and included in closing stock is allowable in view of Section 43B of the Act and levy of interest under Section 201(1A) of the Act was also set

aside. In the aforesaid factual background, the revenue has approached this court.

5. Learned counsel for the revenue while inviting the attention of this court to Section 28(iiib) of the Act submitted that any cash assistance received or receivable by any person against exports under any scheme of the Government Of India is chargeable to Income Tax under the head 'Profits and Gains of Business or Profession'. It is also pointed out that assessee in the instant case is adopting mercantile system of accounting under which the cash receivable has to be treated as business income. However, the aforesaid aspect of the matter has not been appreciated by the Income Tax Appellate Tribunal. It is further submitted that income from technical services has to be reduced by 90% as the same is an independent income and has no nexus with the export and therefore, has to be treated as business income. It is also urged that the tribunal ought to have appreciated that claim for

deduction can be made only by way of revised return and in fact a claim for deduction should be made in the return. It is further submitted that the tribunal could not have dealt with the claim for deduction in the light of Section 43B of the Act for the first time as it is not a pure question of law and the matter should have been remitted to the assessing officer as the same was raised for the first time before the assessing officer. In support of aforesaid submissions, reliance has been placed on decision of the supreme court in '**GOETZE (INDIA) LTD. VS. COMMISSIONER OF INCOME-TAX', (2006) 157 TAXMAN 1 (SC).**

6. On the other hand, learned counsel for the assessee has submitted that substantial question of law No.2 as framed is misconceived as the tribunal has allowed the deduction on accrual basis only. It is further submitted that explanation (baa) to Section 80HHC does not refer to export turnover and therefore, before a receipt is liable to be excluded to the extent of 90% it

must be a receipt of nature similar to brokerage, commission, interest, rent or charges. It is also pointed out that the decision in the case of **CIT, THIRUVANATHAPURAM V. K.RAVINDRANATH NAIR (2007) 295 ITR 228 (SC)** does not deal with the issue of business profits but with total turnover. It is further submitted that a receipt for rendering technical services does not fall within the scope of exclusion contemplated by clause (baa) of the explanation to Section 80HHC and the aforesaid position was conceded in case of assessee for the subsequent year i.e., 1997-98 by the revenue. In this connection, attention has been invited to order dated 05.04.2017 passed by the Income Tax Appellate Tribunal in I.T.A.No.2714/Mum/2003. It is also pointed out that claim with regard to deduction in view of Section 43B of the Act was made before the assessing officer as well as Commissioner of Income Tax (Appeals), which was rejected by Commissioner of Income Tax (Appeals) in paragraph 4 of the order

passed by it. Therefore, the contention of the revenue that the aforesaid claim was raised for the first time before the Income Tax Appellate Tribunal is factually incorrect. It is further submitted that in any case no loss has been caused to the revenue. In support of aforesaid submissions, reliance has been placed on decisions in '**CIT VS. EXCEL INDUSTRIES LTD', (2013) 38 TAXMANN.COM 100 (SC), 'CIT VS. SRIYANSH KNITTERS (P.) LTD.', (2011) 12 TAXMANN.COM 187, 'CIT AND ANR. VS. SYNDICATE BANK', ITA NO.98/2010, ' ORDER DATED 25.09.2006 IN ITA NOS.2484 AND 2396/BOM/93, ' ORDER DATED 23.04.2008 IN M.P.NO.226/M/2007 IN ITA NOS.2484 AND 2396/BOM/93, ITA NO.1027/2010, 'ORDER DATED 12.12.2014 IN ITA NO.1027/2010, 'CIT AND ANOTHER VS. MOTOR INDUSTRIES COMPANY LTD.,', ITA NO.28/2005, 'CIT AND ANOTHER VS. ROBERT BOSCH (INDIA) LTD.,', ITA NO.507/2007,**

'INGERSOLL-RAND INDIA LTD. VS. CIT AND ANOTHER', ITA NO.6/2011, ITA NO.6611/Mum/2002, 'ITA NO.2554/Mum/2003, 'BERGER PAINTS INDIA LTD. VS. CIT', (2004) 135 TAXMAN 586 (SC), 'RADGASAOMI SATSANG VS. CIT', (1992) 60 TAXMAN 248 (SC).

7. We have considered the submissions made on both the sides. From perusal of substantial question of law Nos.1 and 3, we find that the findings on the issues covered by the aforesaid substantial questions of law are based on proper appreciation of evidence on record. The aforesaid findings of fact can neither be termed as either perverse or arbitrary. In our considered opinion, no substantial questions of law are involved as framed by this court in the aforesaid questions of law and the same are questions of fact. Therefore, it is not necessary to answer the same as issues covered under the aforesaid questions of law are pure finding of fact. From close scrutiny of the order passed by the tribunal,

it is axiomatic that 4th substantial question of law does not arise for consideration as it is held against the assessee by the tribunal. The 5th and 8th substantial questions of law have been answered against the revenue by the Supreme Court in '**ACG ASSOCIATED CAPSULES (P) LTD. VS. CIT**', 343 ITR 89 SC and **COMMISSIONER OF INCOME TAX, NEW DELHI VS. ELI LILLY & CO. (INDIA) (P.) LTD.**', 312 ITR 225 (SC) respectively. Accordingly, the same are answered against the revenue and in favour of the assessee.

8. Substantial question of law Nos.2, 6 & 7 survive for consideration in this appeal. Insofar as substantial question of law No.2 is concerned from perusal of paragraph 12 of the order passed by the Income Tax Appellate Tribunal, it is evident that the tribunal has permitted deduction on accrual basis and has held that an amount would be receivable only when the income accrues to the assessee and income would

accrue to the assessee only when the assessee gets such a right to receive the income. It has further been held that assessee would get a right to receive the amount only when it is sanctioned to the assessee by the custom authorities and not when the assessee makes a claim of the same. It was also held that since, the amount of cash compensatory assistance and duty drawback during the relevant year was not sanctioned to the assessee therefore, the income has not accrued to the assessee. Thus, in fact the tribunal has allowed the deduction on accrual basis only. Therefore, the 2nd substantial question of law is answered against the revenue and in favour of the assessee.

9. So far as 6th substantial question of law is concerned, this court in '**COMMISSIONER OF INCOME TAX VS. MOTOR INDUSTRIES CO. LTD.,', (2011) 331 ITR 79 (KARNATAKA)** as well as in '**COMMISSIONER OF INCOME TAX VS. M/S ROBERT BOSCH (INDIA) LTD.,', DATED 10.10.2013**

RENDERED IN ITA NO.507/2007 while taking into account the decision of the Supreme Court in RAVINDRANATHAN NAIR supra as well as decision of the Bombay High Court in '**COMMISSIONER OF INCOME TAX VS. PFIZER LTD.**', (2011) 330 ITR 62 (Bom.) has held that if any income is derived from the export by way of foreign exchange, such income is not deductible and the benefit of that income has to be given to the assessee. The expression 'any receipt of a similar nature' has to be understood in the context of the words preceding such expression viz., brokerage, commission, interest, rent or charges. It has further been held that such receipts have no nexus with the income earned by way of foreign exchange and every receipt is not an income and every income would not necessarily include element of export turnover. Similar view was taken by this bench in decision dated 11.03.2020 rendered in the case of '**INGERSOLL-RAND (INDIA) LIMITED VS. THE COMMISSIONER OF INCOME-TAX I in ITA**

NO.6/2011 AND CONNECTED CASES. In view of aforesaid well settled legal position, 6th substantial question of law is also answered against the revenue and in favour of the assessee.

10. So far as 7th substantial question of law is concerned, from perusal of paragraph 4 of the order passed by the Commissioner of Income Tax (Appeals), we find that ground was taken with regard to deduction under Section 43B of the Act before Commissioner of Income Tax (Appeals) and the same was also taken before the Income Tax Appellate Tribunal. Therefore, it cannot be said that the assessee raised the aforesaid issue for the first time before the Income Tax Appellate Tribunal. The Supreme Court in *BERGER PAINTS (INDIA) LTD.*, supra has quoted with approval the observation made by the special bench of Income Tax Appellate Tribunal in *INDIAN COMMUNICATION P. LTD.*, IAC, (1994) 206 ITR 96 to the effect that whether full deduction was allowed in one year or partly in one year

and partly in the next, since, the assessee is a company and the rate of tax is uniform the gain to one and loss to other is illusory, since, what is referred is one year would have to be discharged in the next. It was further held that in that sense, nobody has won and nobody has lost. In other words, no loss has been caused to revenue. For the aforementioned reasons, the 7th substantial question of law is also answered against the revenue and in favour of the assessee.

In view of the preceding analysis, we do not find any merit in this appeal. The same fails and is hereby dismissed.

**Sd/-
JUDGE**

**Sd/-
JUDGE**