

OD-23

IN THE HIGH COURT AT CALCUTTA  
SPECIAL JURISDICTION (INCOME TAX)  
ORIGINAL SIDE

IA No.GA 2 OF 2018  
(OLD NO: GA/399/2018)  
In  
ITAT 25 OF 2018

PRINCIPAL COMMISSIONER OF INCOME TAX – CENTRAL-1, KOLKATA  
VS.  
M/S. FEEGRADE & COMPANY PVT. LTD.

BEFORE:

The Hon'ble JUSTICE T. S. SIVAGNANAM  
AND

The Hon'ble JUSTICE HIRANMAY BHATTACHARYYA

Date : January 04, 2022.

*Appearance:*

*Mr. Smarajit Roychowdhury, Adv.  
for the appellant*

*Mr. Subhas Agarwal, Adv.  
for the respondent*

The Court : This appeal by the revenue under Section 260A of the Income Tax Act, 1961 (the Act in brevity) is directed against the order dated 5<sup>th</sup> April, 2017 passed by the Income Tax Appellate Tribunal “C” Bench, Kolkata (the Tribunal) in IT(SS) No. 3836/Kol/2015 for the assessment year 2010-11, 2011-12 and 2012-13 respectively.

The revenue has raised the following substantial questions of law for consideration :

- a) Whether as per the explanation (i) of Section 37 of the Income Tax Act, 1961, punitive charges paid to the Railways in violation of the provision of Indian Railway Act 1989 are not allowable expenditure and no deduction shall be made in respect of such expenditure.
- b) Whether on the fact and circumstances of the case, the Learned Income Tax Appellate Tribunal erred in deleting the addition made under section 37 of the Income Tax Act on account of Railway Punitive charges.
- c) Whether on the fact and circumstances of the case, the Learned Income Tax Appellate Tribunal erred in law in deleting the disallowance as the overloading charges is nothing but penalty as per Provision of Section 73 of the Indian Railway Act 1989.
- d) Whether on the fact and circumstances of the case Net Present Value (NPV) paid to Forest department is a non-recovering outlay whose benefit was/would be consumed for several years and it was one time/lump sum payment and such NPV paid by the assessee as statutory obligation for maintenance of environment for mining purpose and therefore it is capital expenditure and cannot be deducted as revenue expenditure.
- e) Whether on the fact and circumstances of the case, the Learned Income Tax Appellate Tribunal erred in treating the Net Present Value (NPV) as revenue in nature and not capital in nature.

We have heard Mr. Smarajit Roychowdhury, learned Counsel for the appellant/revenue and Mr. Subhas Agarwal, learned Counsel for the respondent/assessee.

The substantial questions of law (a), (b) and (c) above deal with whether the punitive charges paid to the Railways for alleged violation of the provision of Indian Railway Act could be allowable as expenditure and whether deduction can be claimed by the assessee in respect of such expenditure. This issue has been decided in favour of the respondent/assessee by following the decision of the Hon'ble Supreme Court in Prakash Cotton Mills Pvt. Ltd. reported in 201 ITR 684 wherein it was held that the payment made to the Railway for overloading of wagons is compensatory in nature and can be allowed under explanation to Section 37(1) of the Act. Furthermore, on facts the Tribunal noted that when the respondent/assessee loads the goods for dispatch through railway wagons actual measurement of weight cannot be done due to absence of weighing bridge at the originating station. Thus, we find that the Tribunal rightly decided the issue in favour of the respondent/assessee. Accordingly, the substantial questions of law (a), (b) and (c) all are answered against the appellant/revenue. So far as substantial questions of law (d) & (e) above are concerned identical issue was decided in assessee's group company's case in ITAT 133 of 2015 dated 21<sup>st</sup> June, 2018. This decision was followed in another assessee's group company's case in *PCIT -VS- M/s. Rungta Sons Pvt. Ltd.* in ITAT 295 of 2017 dated 10<sup>th</sup> December, 2021. Operative portion of the order reads as follows:-

“We have heard Mr. Smarajit Roychowdhury learned counsel for the appellant/revenue and Mr. Subash Agarwal, learned counsel for the respondent/assessee.

It is not disputed before us that identical substantial questions of law were considered by this Court in the case of group company of the respondent/assessee in ITAT/133/2015 and by judgment dated 21<sup>st</sup> June, 2018 the appeal filed by the revenue was dismissed. The operative portion of the judgment reads as follows:

*"Both the Commissioner (Appeals) and the Appellate Tribunal have referred to a judgment reported at 107 ITR 39 (Bikaner Gypsums Ltd. vs. CIT), where a similar question arose. A licence in respect of a certain area had been granted in favour of the assessee in that case for undertaking mining operations. The railways purported to set up railway tracks and even a station on the land without reference to the assessee and unmindful of the assessee's underground rights in respect thereof. The dispute between the assessee and the railways was resolved upon the relevant stakeholders including the assessee, the railways and the State Government agreeing to share the additional expenses for removing the railway station and tracks to allow the area to be mined by the assessee. The payment made by the assessee in that case fell for consideration of the Supreme Court. The Supreme Court observed that since the assessee was entitled to carry on mining operations and such payment had been made for the removal of the difficulty in the assessee carrying on its business in accordance with its licence, the expenditure had to be regarded as a revenue expenditure and could not be treated as a capital expense.*

*The dictum in Bikaner Gypsums Ltd. is squarely applicable in the present case. This is not a case where the assessee, upon payment of the NPV, obtained a fresh right to undertake any business. That right of the assessee was covered by the licence previously granted in its favour by the State of Odisha. The NPV payment is a kind of a compensation for using forest land for non-forest purpose pursuant to an order of the Supreme Court. The payment of the NPV in this case, like in the case of Bikaner Gypsums Ltd., has to be regarded as a revenue expenditure in accordance with the ration in the Bikaner Gypsums Ltd. case, since it was a one-time payment made to remove an obstacle from the path of the assessee carrying on its business operations.*

*On behalf of the Revenue, a judgment reported at 86 ITR 647 (R.B.Seth Moolchand Sugachand v CIT) has been cited where a prospecting licence fee was found to be a capital expenditure. However, as is evident from paragraph 11 of the report, the fee was paid for obtaining a prospecting licence and it was such fee that entitled the business to be conducted in the relevant area. The distinction between the judgment in R.B.Seth Moolchand Sugachand and the judgment in Bikaner Gypsums Ltd. is that in Bikaner Gypsums Ltd. there was a pre-existing right and the expenditure was incurred not to assert a new right but to exercise a pre-existing right. In the present case, it is the same as in Bikaner Gypsums Ltd. since the mining licence was previously issued in favour of the assessee and the payment of the NPV did not extend the area of the assessee's mining operations, it merely removed an impediment in the carrying on of the operations in terms of the original licence.*

*In R.B.Seth Moolchand Sugachand a fee was paid to obtain a prospecting licence. In other words, the right to carry on any prospecting or mining business was conditional upon the fee being paid. Even if the assessee in that case had been conducting mining or prospecting operations prior to obtaining the relevant licence, it was relevant licence which gave the assessee the right in respect of a particular area and that is the distinguishing feature.*

*For the reasons aforesaid, the concurrent findings of the Commissioner (Appeals) and the Appellate Tribunal based on a long-standing judgment of the Supreme Court does not call for any interference."*

Thus, following the above decision, the appeal filed by the revenue is dismissed. In the result, the substantial questions of law are answered against the revenue . "

Thus, following the above decision substantial question of law Nos. (d) and (e) are answered against the revenue.

In the result, the appeal filed by the revenue is dismissed and the substantial questions of law are answered against the revenue.

Consequently, the application stands also dismissed.

(T. S. SIVAGNANAM, J.)

(HIRANMAY BHATTACHARYYA, J.)

pa/GH.