IN THE HIGH COURT AT CALCUTTA
CIVIL APPELLATE JURISDICTION
ORIGINAL SIDE

HEARD ON : 13.06.2022

DELIVERED ON : 13.06.2022

THE HON'BLE MR. JUSTICE T.S. SIVAGNANAM
AND
THE HON'BLE MR.JUSTICE HIRANMAY BHATTACHARYYA

ITA NO. 45 OF 2010

SURENDRA COMMERCIAL & EXIM PVT. LTD.
Vs.
INCOME TAX OFFICER, WARD-8 (4), KOLKATA

Appearance:
Mr. Subhas Agarwal, Advocate
...for the appellant

Mr. Prithu Dudheria, Advocate
...for the respondent

JUDGMENT

(Judgment of the Court was delivered by T.S. SIVAGNANAM, J.)

(T.S. SIVAGNANAM, J.) **: -** This appeal by the assessee filed under Section 260A of the Income Tax Act, (the Act, for brevity) is directed against the order dated 27.11.2009 passed by the Income Tax Appellate Tribunal "B" Bench, Kolkata in I.T.A. No. 853/Kol/2009 for the assessment year 2005-06.

The assessee has raised the following substantial question of law for consideration:-

"Whether on the facts and circumstances of the case and on law the Learned Income Tax Appellate Tribunal erred in granting relief to the assessee on account of claim of additional depreciation U/s. 31(1)(iia) of the said Act of Rs.77,78,79,369/- disallowed by the Assessing Officer as the Provision came into effect subsequent to the year under consideration in respect of the business of generation and distribution of power, in which the assessee was engaged?"

We have heard Mr. Subhas Agarwal, learned Advocate appearing for the appellant/assessee and Mr. Prithu Dudheria, learned standing counsel for the respondent/department.

The short issue which falls for consideration as to whether the assessee was liable to deduct tax at source on the entire amounts paid to the agent.

The learned Advocate appearing for the appellant submitted that the Assessing Officer, the First Appellate Authority and the Tribunal concurrently erred in not taking note of the legal position which has since been well settled by various decisions.

In support of the contention reliance was placed in the decision of High Court of Gujarat in the case of *CIT vs. Gujarat Narmada Valley Fertilizers Company Limited:* reported in *[2013] 35 taxmann.com 638 (Gujarat),* which has been followed by the High Court of Delhi *in CIT vs. DLF Commercial Project Corporation* reported in *[2017] 88 taxmann.com 422 (Delhi).* By referring to the decisions, it is submitted that the Tribunal committed an error in upholding the decision of the First Appellate Authority and thereby affirming the finding of the Assessing Officer that tax had to be deducted at source even in respect

of reimbursements which had been incurred by the agent. Before we examine as to the applicability of the decision, we should take note of the facts and circumstances of the case, more importantly the two Authorities as well as the Tribunal have concluded against the assessee.

Mr. Agarwal, learned Advocate submitted that a paper book was filed before the Tribunal containing the documents which were placed before the Assessing Officer and the First Appellate Authority which have not been properly appreciated.

To test the correctness of this finding, we have carefully perused the assessment order dated 28.12.2007 and in paragraph 7.3 of the said order, the Assessing Officer has dealt with the issue on hand and by pointing out of the fact, the Income Tax Act does not grant any exceptional clause by which non-deduction of tax at source can be resorted to by the assessee under the garb of reimbursement. Thus, on facts, the Assessing Officer disbelieved the stand taken by the assessee.

Before the Appellate Authority the assessee once again reiterated the contention stating that no tax needs to be deducted at source on the reimbursement. This aspect of the matter was considered by the First Appellate Authority and after taking note of the document placed before it, the appeal filed by the assessee was rejected. Before the Tribunal once again, the factual position was examined and the Tribunal has quoted the order passed by the First Appellate Authority with approval. On perusal of the paragraph 9 of the impugned order we find that the Tribunal has approved the factual finding recorded by the First Appellate Authority stating that there is no proof

that brokerage and freight charge by consignment agent from the assessee are not loaded with profit and if it had been a case of true reimbursement the consignment would have enclosed the bill drawn by its brokers and transporters and in that case the assessee could have decided the deductibility of TDS from such bills of brokers and transporters without depending on the consignment agent. Further, the First Appellate Authority has recorded that even after an opportunity was given during the appeal proceeding, the assessee could not establish their stand and, therefore, held that amounts of brokerage and freight can be paid by the assessee to consignment agent are the only available criteria to decide the deductibility of tax at source on the payment of brokerage and freight. Further, the terms and conditions of the agreement of consignment sale was taken note of wherein it is stated that the consignment agent is required to remit the entire sale proceeds and depending on the maximum price realized or other such criteria the assessee will pay commission to the consignment agent. Further noting the facts of the case, the Tribunal held that deduction of tax at source under Section 194C is required to be made on "any sum paid" by the assessee to clearing and forwarding agent and it includes reimbursement of the expenditure. In this regard, the clarification issued by the CBDL was referred to.

The decision in DLF Commercial Project Corporation, which was rendered following the decision in *CIT vs. Gujarat Narmada Valley Fertilizers Co. Ltd.* would be wholly applicable to the facts of the case on hand, wherein the Court had approved the concurrent finding rendered by the First Appellate

Authority. The facts of the case on hand has been noted by the CIT(A), who has rendered a categorical finding that the assessee was unable to establish their stand in spite of opportunity granted to them at the appellate stage. Further, in *CIT vs. Gujarat Narmada Valley Fertilizers Co. ltd.* it has been held that law obliges only amounts which fulfilled the character of income to be subject to TDS. In the case before us, all the two Authorities and the Tribunal have concurrently held that the assessee was unable to produce any document to establish their stand.

In such circumstances, this Court while exercising jurisdiction under Section 260A of the Income Tax Act cannot be called upon to reexamine the facts or to re-appreciate the tenor and ambit of the document which was placed before the Assessing Officer, CITA and more importantly the Tribunal has noted that the assessee has failed to establish the reimbursement which was pleaded by producing document despite opportunity being given at the appellate stage.

Thus, we find that there is no question of law, much less substantial question of law arising for consideration in this appeal.

Accordingly, the appeal being ITA No.45 of 2010 fails and dismissed.

(T.S. SIVAGNANAM, J.)

I agree.

(HIRANMAY BHATTACHARYYA, J.)

GH/s.pal