

IN THE HIGH COURT OF KARNATAKA AT BENGALURU

DATED THIS THE 30TH DAY OF JUNE, 2022

PRESENT

THE HON'BLE MR. JUSTICE P.S. DINESH KUMAR

AND

THE HON'BLE MR. JUSTICE ANANT RAMANATH HEGDE

I.T.A No.169 OF 2014

BETWEEN :

1. THE COMMISSIONER OF INCOME-TAX
C.R. BUILDING
QUEENS ROAD
BANGALORE
2. THE ASST. COMMISSIONER
OF INCOME-TAX
CIRCLE-11(5)
RASHTROTHANA BHAVAN
BRUPATHUNGA ROAD
BANGALORE

... APPELLANTS

(BY SHRI. K.V. ARAVIND, ADVOCATE)

AND :

M/s. KBD SUGARS AND DISTILLERIES LTD
(FORMERLY KARNATAKA BREWERIES &
DISTILLERIES PVT. LTD)
NO.17, SANKEY ROAD
BANGALORE-560 020

... RESPONDENT

(BY SHRI. A. SHANKAR, SENIOR ADVOCATE FOR
SHRI. V. CHANDRASHEKAR, ADVOCATE)

THIS ITA IS FILED UNDER SECTION 260-A OF THE
INCOME TAX ACT, 1961 ARISING OUT OF ORDER DATED:

22.11.2013 PASSED IN ITA NO.1362/BANG/2011, FOR THE ASSESSMENT YEAR 2006-2007 PRAYING TO FORMULATE THE SUBSTANTIAL QUESTIONS OF LAW AND ALLOW THE APPEAL AND SET ASIDE THE ORDER PASSED BY THE ITAT, BANGALORE IN ITA NO.1362/BANG/2011 DATED 22.11.2013 AND CONFIRM THE ORDER OF THE APPELLATE COMMISSIONER CONFIRMING THE ORDER PASSED BY THE ASSISTANT COMMISSIONER OF INCOME TAX, CIRCLE-11(5), BANGALORE.

THIS ITA, HAVING BEEN HEARD AND RESERVED FOR JUDGMENT ON 13.06.2022 COMING ON FOR PRONOUNCEMENT OF JUDGMENT, THIS DAY, **P.S.DINESh KUMAR J**, PRONOUNCED THE FOLLOWING:-

JUDGMENT

This appeal by the Revenue is filed for consideration of three questions of law. However, arguments were addressed on the following two questions.

"1. "Whether, on the facts and in the circumstances of the case, the Tribunal was right in holding that the assessee was eligible for depreciation on the WEGs for the year ending 31.03.2006 without appreciating the findings of the Commissioner of Income Tax (Appeals) that the contradictory statements made by the accountant and the project consultant goes to the root of the factual matrix and the documentary evidences in the form of the report of the Statutory Auditor, the letter from WIL, the Asset Management Agreement, the meeting of the Board of Directors of WIL and IEL are in contradiction

to the claim of the assessee which proves that the sale transaction would not have happened in March 2006?"

2. "Whether, on the facts and in the circumstances of the case, the Tribunal was right in holding that the lower authorities were not justified in denying the benefit of set off of brought forward losses without appreciating that as the undertaking taken over, MOL was not a 'going concern' the condition specified under section 2(19AAA) (vi) has not been satisfied and therefore the assessee is not eligible for the claim of set off of brought forward losses under section 724(A)?."

Brief facts of the case are:

2. Revenue's case is, Respondent assessee, involved in the business of IMFL¹ Sugar and generation of wind energy had claimed depreciation of Rs.9,73,54,400/- for the assessment year 2006-07 on the ground that it had purchased windmills worth Rs.24,33,86,000/- during March 2006 from M/s Indowind Energy Ltd. ('IEL' for short). The Assessing Officer disallowed the claim on the premise that there was no proof for having

¹ Indian Made Foreign Liquor

bought the windmills as no invoices were found during the survey in assessee's premises and the end users of the windmill energy had confirmed that they had learnt about the transfer of the windmills from IEL to the assessee in May 2006.

3. The Assessing Officer held that assessee was ineligible for the benefit of 'brought forward loss' under Section 72A (4) of the Income Tax Act² 1961; because the rectified spirit undertaking belonging to M/s Maruthi Organics Ltd. ('MOL' for short) was dysfunctional since 1999 and it was not a going concern.

4. The CIT (Appeals)³ vide order dated 04.11.2011 has dismissed assessee's appeal. Further, the ITAT⁴ vide order dated 22.11.2013 has

² 'Income-Tax Act' for short

³ Commissioner of Income Tax

⁴ 'Income Tax Appellate Tribunal

allowed assessee's appeal for the A.Y.⁵ 2006-07 and partly allowed assessee's appeal for A.Y. 2007-08. Hence this appeal by the Revenue.

5. Shri. Aravind, learned standing counsel for the revenue submitted that:

- Assessee has claimed that it has purchased 37 windmills from IEL on 15.03.2006 and 24.03.2006. Survey was conducted on 28.03.2006. No invoices were made available by the executives of the assessee company. In his statement, one of the executives has stated that he was ignorant of any transaction. Therefore the assessing officer has rightly disallowed the claim. And the same was confirmed by CIT⁶;

⁵ Assessment Year

⁶ Commissioner of Income-Tax

- The ITAT has erred in allowing the appeals by placing reliance on *Union of India Vs. Azadi Bachao Andolan*⁷;
- The ITAT has failed to appreciate that the assessee was ineligible for the benefit of 'brought forward loss' under Section 72A (4) of the Act, because the unit belonging to MOL was dysfunctional since 1999 and it was not a 'going concern' and does not satisfy the demerger defined under the Act and violates sub-clause (vi) of Section 2(19AA) of the Act.

6. In reply, Shri. Shankar, learned Senior Advocate submitted that:

- The transaction of purchase of windmills was completed in March 2006;
- The department conducted the survey on 28.03.2006 to find out about the very transaction;

⁷ 263 ITR 706 [SC]

- The survey conducted by the revenue itself establishes that it had sufficient information with regard to the purchase of windmills by the assessee;
- The revenue has accepted assessee's income offered to tax from the sale of power generated from the windmills from 15.03.2006 ending on 31.03.2006;
- The IEL or Wescare (India) ('WIL' in short) have not offered the income during that period to tax because admittedly the windmills were purchased by the assessee.

7. With regard to the second question of law, he submitted that the spirit unit was an ongoing concern. He argued that if an unit were to be fully functional and making profits, the same would not be demerged. Only such units which become non functional or suffer losses are demerged. In substance, he argued that Revenue

has misconstrued sub-clause (vi) of Section 2(19AA) to mean as a running unit.

8. We have carefully considered rival contentions and perused the records.

9. The first question of law is whether assessee was eligible for depreciation for the year ending 31.03.2006. Revenue's case is that the transaction has not taken place in March because no documents such as bills or invoices were produced during survey conducted on 28.03.2006.

10. ITAT has recorded a finding of fact in para 7.4 of its order that WIL has sold 28 WEGs to IEL under invoice dated 15.03.2006 and the same has been admitted by WIL in its letter. It has also recorded that WIL has given effect to the sale of 28 WEGs in its account books for the year ending 31.03.2006. Thus it has accounted for income

which arose out of sale during the A.Y. 2006-07 subject to arbitration proceedings.

11. Shri. Shankar has also made available to us copies of the invoices. It is settled that the tribunal is the last fact finding authority and it has recorded that the transactions has taken place on 15.06.2006. It is also relevant to note that assessee has offered the income from 15.03.2006 ending on 31.03.2006 to tax. On this aspect, Shri Aravind's argument is, mere offering some income as income from the WEGs does not improve assessee's case. If any assessee files its returns and offers any income to tax, the same is accepted by the department and that does not prove that the windmill transaction has taken prior to 31.03.2006.

12. Shri. Aravind has also has produced the original records. It is not in dispute that survey was

conducted on 28.03.2006 and the Revenue has recorded the statements of the assessee's accountant. Shri. Shankar contended that merely because the accountant had pleaded ignorance of the transaction, it does not mean that the transaction has not taken place. The ITAT has recorded that the Managing Director of the assessee company was not questioned during the survey but enquires was made only with the accountant. ITAT has also noted that assessing officer had lost sight of this vital aspect.

13. It is not in dispute that WIL has admitted the transaction. It has not claimed depreciation for the year ending 31.03.2006. The Managing Director of the assessee company has not been questioned.

14. Thus the ITAT, based on records, having recorded a finding of fact that the transaction had taken place in March 2006; and the assessee

having offered the income generated from the WEGs between 15.03.2006 ending on 31.03.2006 to tax, in our considered view, the first substantial question raised by the revenue needs to be answered in favour of the assessee.

15. The second question raised by the revenue is with regard to the benefit of set off of 'brought forward losses'. Shri Aravind has mainly urged that sub-clause (vi) of Section 2(19AA) refers to a going concern and therefore provisions of Section 72A cannot be applied. It is not in dispute that the scheme of demerger has been approved by this Court and the High Court of Andhra Pradesh. The ITAT has recorded the relevant portion of the approval of scheme as ordered by this Court and it reads as follows:

"Part II**4. TRANSFER OF UNDER TAKING**

4.1. On and with effect from the appointed date, the demerged undertaking shall, pursuant to the provisions contained in the section 394(2) of the Act and other applicable provisions of law for the time being in force and without any further act or deed, be demerged from MOL, and be transferred to and vest in or be deemed to have been transferred to and vested in KSDL on the appointed date, on a going concern basis, so as to become as and from the appointed date, the undertaking of KSDL."

16. Shri. Shankar is right in his submission that if a unit were to be running and profitable one, the same would not be available for demerger.

17. The Tribunal has relied upon its order dated 28.09.2012 in the case of *JCIT Vs Valdel Engineers and Constructors Pvt. Ltd*⁸. It was submitted by Shri. Aravind that ITA No.80/2013 filed against ITAT's order in *Valdel* case was withdrawn by the Revenue. In our considered view,

⁸ ITR No. 1370/B/2011 dated 28.09.2012

it would be incongruous to construe sub -clause (vi) of section 2 (19AA) as to mean a running unit.

18. In view of the above, the second substantial question of law raised by the Revenue also deserves to be answered in favour of the assessee and is accordingly answered.

19. Resultantly this appeal fails and is accordingly ***dismissed***.

**Sd/-
JUDGE**

**Sd/-
JUDGE**

SPS