IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE K.VINOD CHANDRAN
&
THE HONOURABLE MR. JUSTICE ASHOK MENON

FRIDAY, THE 8TH DAY OF JUNE 2018 / 18TH JYAISHTA, 1940

ITA.No. 1377 of 2009

AGAINST THE ORDER IN ITA 644/2005 of I.T.A.TRIBUNAL,COCHIN BENCH DATED 26-02-2008

APPELLANT(S)/APPELLANT/APPELLANT:

THE COMMISSIONER OF INCOME TAX,
COCHIN.

BY ADVS.SRI.P.K.R.MENON,SR.COUNSEL,
GOI(TAXES)
SRI.JOSE JOSEPH, SC, FOR INCOME TAX

RESPONDENT(S)/RESPONDENT:

M/S.TATA CERAMICS LTD.,KOCHI.

R BY ADV. SRI.E.K.NANDAKUMAR

THIS INCOME TAX APPEAL HAVING BEEN FINALLY HEARD ON 08-06-2018, ALONG WITH ITA NO. 1393/2009, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

APPENDIX

APPELLANT'S ANNEXURES:

ANNEXURE A: COPY OF ORDER UNDER SECTION 143(3) R.W.S 147 DATED 21.03.2002 FOR THE ASSESSMENT YEAR 1996-97

ANNEXURE B: COPY OF ORDER DATED 11.03.2005 OF THE COMMISSIONER OF INCOME TAX (APPEALS)

ANNEXURE C: COPY OF THE ORDER DT 26.02.2008 OF THE INCOME TAX APPELLATE TRIBUNAL, COCHIN BENCH IN ITA NO 644/COCH/2005

ANNEXURE D: COPY OF INSTRUCTION NO. 2/05 DT 24.10.2005

RESPONDENTS ANNEXURES: NIL

TRUE COPY

P.A TO JUDGE

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K. VINOD CHANDRAN & ASHOK MENON, JJ

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I.T Appeal Nos. 1377 of 2009 &
1393 of 2009

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Dated this the 08th day of June, 2018

J U D G M E N T

Vinod Chandran, J

The question arises as to whether the assessee was entitled to claim the benefit under Section 35AB of the Income Tax Act, 1961 which according to the Department could be claimed only from the commencement of the business. However, the questions of law raised is on the question of applicability of the monitory limit, in filing appeals; when the subject matter of the questions of law raised have a cascading effect in the general application of the Income Tax Act and the question also is one which arises periodically in the case of other assessees too. This is so since the Tribunal relied on a Circular to reject the appeals without consideration on merits. The questions of law framed are as follows:

> "1. Whether, on the facts and in the circumstances of the case and also in the light of the decision reported in 286 ITR 1 should not the Tribunal have decided the case on merits?
>
> 2. Whether, on the facts and in the circumstances of the case do the circulars and 276 ITR 519 relied on by the Tribunal have application to the facts of the case?

2. The learned Counsel appearing for the Revenue has placed before us a decision dated 31.10.2017 in ITA 70/2014 wherein a Division Bench of this Court directed another appeal to be considered on merits despite the CBDT directions on

mornitory limit standing against the filing of the said appeal. In the present case, the issue is as to whether 1/6th amount paid by the assessee for know-how for the purpose of setting up of modern plant is allowable under Section 35AB when the assesseee had not commenced business in the relevant assessment year. The First Appellate Authority had found that the expenses, being incurred for the purpose of know-how, definitely, the same is allowable. The Tribunal refused to entertain the appeal relying on the circular of the CBDT restraining the Department from filing appeals where the tax effect is less than Rs.2 lakhs. It was found that the circular applies equally to old cases and new cases. The learned Counsel appearing for the assessee also submits that the tax effect, in the subject year and the succeeding years was NIL for reason of the assessee having continuosly suffered loss in all the years. There can be no cascading effect atleast in the case of the assessee. In such circumstances, we are of the opinion that the questionof law arising from the First Appellate Authority's order can be left open for consideration in an appropriate case.

The Income Tax Appeals would stand rejected answering the questions raised against the Revenue and in favour of the assessee finding that the appeal before the Tribunal was not maintainable. No order as to costs.

Sd/-
K. Vinod Chandran, Judge

Sd/-
Ashok Menon, Judge

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