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IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
INCOME TAX APPEAL NO. 1288 OF 2016

Pr. Commissioner of Income Tax-19 ..Appellant
Vs.
Pukhraj S. Jain ..Respondent

.....

Mr. Ashok Kotangle a/w. Ms. Padma Divakar for appellant.
Mr. Tanzil Padvekar for respondent.

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CORAM : AKIL KURESHI &
M.S. KARNIK, JJ.
DATE : 4th JANUARY, 2019

P.C. :

The Revenue is in Appeal against the judgment of Income Tax Appellate Tribunal dated 10/11/2015. Following questions have been presented for our consideration :

1. Whether on the facts and circumstances of the case and in Law, the Hon. ITAT was justified in upholding the decision of the Ld. CIT(A) by completely ignoring the contention of the revenue in respect of violation of Rule 46A of the I T Rules, 1962 ?

2. Whether on the facts and circumstances of the case and in Law, the Hon. ITAT was justified in upholding the decision of the Ld. CIT(A) wherein the addition by the A.O., by invoking section 41 of the I T Act, 1961 was deleted ?

2. Briefly stated the facts are that,

The respondent assessee is an individual and engaged in the business of imports. The Assessing Officer while assessing return of the respondent assessee for the assessment year 2010-11 noticed that there were several sundry creditors towards whom the assessee had not repaid a sum of Rs.1.79 crores (rounded off) for over three years. The Assessing Officer therefore after putting the assessee to notice invoked Section 41(1) of the Income Tax Act, 1961 ('the Act' for short).

3. The assessee carried the matter in Appeal and in addition to raising legal contentions, the appellant contended that in subsequent years most of the creditors were paid off. The evidence in this respect was produced before the Commissioner (Appeals). The Commissioner (Appeals) allowed the Appeal upon which the Revenue approached the Tribunal. The Tribunal by the impugned judgment dismissed the Revenue's Appeal. The Tribunal noted that the assessee was unable to repay the creditors because of weak financial position and further that the

assessee had never completely stopped making repayments. The Tribunal also noted that in next couple of years the assessee had in fact repaid a sum of Rs. 1.54 crores out of Rs.1.79 crores. The Tribunal, therefore, concluded that the assessee never treated the liability to have ceased.

4. It is well settled through series of judgments that merely because a debt has not been repaid for over three years, would not automatically imply cessation of liability. Exhaustion of period of limitation may prevent filing of recovery proceedings in a Court of law, nevertheless it cannot be stated by itself that the liability to repay the amount had ceased. Going by this logic itself, the Assessing Officer, in our opinion, committed an error invoking Section 41(1) of the Act. Further the assessee had produced additional evidence on record before the Appellate Authority after following the procedure and pointed out that substantial portion of the debt was cleared in later assessment years.

5. We do not find any error in the decision of the Tribunal. Income Tax Appeal is dismissed.

(M.S. KARNIK, J.) **(AKIL KURESHI, J.)**

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

INCOME TAX APPEAL NO. 1769 OF 2016

The Pr. Commissioner of Income Tax-1 .. Appellant
v/s.
Mahalaxmi Infra Projects Ltd. .. Respondent

Mr. N.N. Singh for the appellant
Mr. Mihir Naniwadekar I/b Alisha Pinto for the respondent

CORAM : AKIL KURESHI &
M.S. SANKLECHA, J.J.

DATED : 30th JANUARY, 2019

P.C.

1. This appeals is admitted for consideration on following re-framed substantial questions of law :-

(a) Whether, the respondent / assessee fulfills the requirement stipulated in Section 80-IA(4) of the Income Tax Act, 1961 once the conclusion reached is that it is contractor and not developer as stated in the sub-section?

(b) Whether, in the facts and circumstances of the case the Income Tax Appellate Tribunal was right in holding that even if the Assessee is termed as contractor he had developed, operated and maintained infrastructural facility and hence entitled to the deductions within the meaning of sub-section?

2. Registry is directed to communicate a copy of this order to the

Tribunal. This would enable the Tribunal to keep the papers and proceedings relating to the present appeals available, to be produced when sought for by the Court.

3. Mr. Naniwadekar, learned Counsel appearing for the respondent waives service.

4. To be heard along with Income Tax Appeal Nos. 183 and 184 of 2012.

5. We notice that the Revenue has proposed following additional questions for our consideration :-

> *(i) Whether on the facts and in the circumstances of the case and in law, the Tribunal was right in deleting the addition made by the AO u/s 41(1) on account of bogus claim of expenses in the name of labour contractors / sub-contractors which are outstanding for a number of years?*
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> *(ii) Whether on the facts and in the circumstances of the case and in law, the Tribunal erred in allowing depreciation @80% on civil construction, electrical and other non-integral installations ?*

(ii) Whether on the facts and in the circumstances of the case and in law, the Tribunal erred in allowing depreciation @80% on civil work on which depreciation was allowable @ 10% and since civil works are not specially designed devices, the same are not entitle for higher rate of depreciation?

(iii) Whether on the facts and in the circumstances of the case and in law, the Tribunal erred in allowing higher rate of depreciation on electrical and other installations without appreciating the fact that electrical items are not part of electricity generating apparatus but are part of electricity selling apparatus and these constitute the block 'Plant and Machinery' on which depreciation is allowable @15% ?

6. In so far as question no.(i) is concerned, the same arises out of the additions made by the Assessing Officer under Section 41(1) of the Income Tax Act, 1961 (the Act for short) on account of bogus claim of liability. The Tribunal while giving relief to the assessee, referred to the decision of the Supreme Court and other decisions holding that merely because period of 3 years expired from arising of the liability would not automatically mean that the liability has ceased. We do not find any error in the view of the Tribunal.

7. Question nos. (ii), (iii) and (iv) relate to the Revenue's objection to the assessee claiming higher rate of depreciation on the civil construction, electric and other installations by the assessee in the process of erecting and installing windmill. The Revenue argues that the expenditure in such activities cannot be seen as a part of installation of windmill and, therefore, the depreciation prescribed for the same would not be available to the assessee. We notice that the similar question had come up for consideration before this Court in Income Tax Appeal No.1326 of 2010, wherein the appeal was dismissed by order dated 14th June, 2017 making following observations:-

> *2. The Tribunal has recorded finding of fact that windmill was erected in the desert area of Rajasthan which required special foundation of reinforced cement concrete and that the said reinforced cement concrete formed integral part of the windmill. The Tribunal has also followed the decision of this Court in the case of Commissioner of Income Tax Vs. Herdilla Chemicals Ltd. reported in (1995) 216 I.T.R. 742 (Bom) in allowing the claim of the assessee. In our opinion, the finding recorded by the Tribunal that RCC foundation forms integral part of the windmill is a finding of fact and no question of law arises from the same. Hence the appeal is dismissed with no order as to costs.*

8. In the result, these additional questions are not entertained.

(M.S. SANKLECHA, J.) **(AKIL KURESHI, J.)**