IN THE HIGH COURT OF JUDICATURE FOR RAJASTHAN AT JODHPUR

ORDER

Commissioner of Income-Tax, Jodhpur Vs. M/s.Anop Udai Works

D.B. INCOME TAX REFERENCE APPLICATION NO.64/1998

Reportable Date of Order : 28th May 2007

HON'BLE MR.JUSTICE P.B.MAJMUDAR
HON'BLE MR. JUSTICE DINESH MAHESHWARI

Mr.Sangeet Lodha for revenue
Mr.Sanjeev Johari for assessee

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BY THE COURT: (Per Hon'ble Maheshwari,J.)

This application under Section 256(2) of the Income Tax Act, 1961 ('the Act') has been moved by the Commissioner of Income Tax, Jodhpur because the Income Tax Appellate Tribunal, Jaipur Bench, Jaipur has refused the application made by the Department to refer the following as a question of law to this Court:-

> ''Whether on the facts and in the circumstances of the case the Hon'ble Tribunal was legally justified in allowing terminal allowance under sec.32(1) (iii) of the IT Act?''

The question aforesaid was proposed for reference in the background of the facts that the assessee M/s.Anop Udai Works is a registered firm engaged in manufacture of sarees.

During the period relevant to the assessment year 1983-84, the assessee debited an amount of Rs.1,97,926/- towards repairs and maintenance; and this included a sum of Rs.1,31,305/- which was claimed as terminal allowance by the assessee under Section 32 (1)(iii) of the Act towards the alleged discarded copper rolls. The Assessing Officer ('the AO') referred to the relevant entry in the accounts and posed a question in relation thereto that the rolls seem only to have been revalued and not discarded to which the assessee submitted a copy of rolls accounts and claimed the amount to be allowable under Section 32(1) (iii) of the Act. The learned AO was not satisfied with the reply and observed that the rolls in question have neither been sold nor destroyed nor discarded. The learned AO further observed that manufacturing process could not have been undertaken without such rolls; and the amount claimed by the assessee at Rs.1,31,305/- was the depreciated value of the existing rolls but no new rolls were purchased during the year under consideration. The learned AO thus disallowed the claim made on the basis of alleged discard of rolls and considered it to be a case only of revaluation.

The contention of the assessee against rejection of such claim towards terminal allowance on rolls account was not accepted in appeal either; and the Appellate Commissioner observed that the claim of the appellant was not covered

under any of the instances mentioned in Section 32(1) (iii) of the Act and confirmed disallowance in that regard.

However, the Income Tax Appellate Tribunal, Jaipur Bench, Jaipur accepted the contention of the assessee with the observation that it was only the assessee who was competent to judge the utility or obsolescence of any equipment; and once the assessee decides that the rolls are no longer usable, they are said to be discarded even though, physically they might remain with the assessee, and terminal allowance has to be granted unless evidence was brought on record about they being used. The Tribunal observed that merely because there was no new purchase of rolls, it cannot mean that written off rolls were used because the assessee was having with it the stock of usable rolls. The consideration by the learned Tribunal in its judgment dated 12.07.1995 reads thus:

> ‘’10. During the year the assessee debited Rs.1,97,926/- as repairs and maintenance. This included Rs.1,31,305/- on account of discarded copper rolls which was claimed as terminal allowance by the assessee u/s. 32(1)(iii). The AO refused to allow the claim of the assessee as, in his opinion, the assessee had not discarded the rolls but had merely revalued them. The ld. CIT (A) also confirmed the disallowance.
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> “11. We see no reason to disbelieve and disallow the claim of the assessee. It is only the assessee who is competent to judge the utility or obsolescence of any equipment. Once the assessee decides that the rolls are no longer usable, they are said to be discarded even though, physically they may be with the assessee,

> and terminal allowance has to be granted unless an evidence that they are being used is brought on record. No such evidence has been brought on record by the department. The fact that there are no new purchasers of rolls does not mean that the written of rolls are used, because the assessee is having a stock of usable rolls with it. Hence, we allow the ground of the assessee with a direction that terminal allowance of Rs.1,31,305/- be allowed u/s. 32 (1)(iii).''

Upon the department seeking a reference under Section 256(1) of the Act, the Tribunal was of opinion that its decision was based on two essential findings that the assessee discarded the rolls and that the assessee had a stock of usable rolls; and, considering both these to be the findings of fact, the Tribunal was of opinion that the order in question does not give rise to any question of law.

It has been contended in this reference application that the Tribunal has erred in not considering the fact that the assessee never discarded the rolls but only revalued them and claimed as a deduction under Section 32(1) (iii) and such claim has rightly been disallowed by the AO. It has been submitted that the assessee had the stock of rolls whose value according to the books of accounts was Rs.2,29,491/-; and that the assessee devalued the entire lot by applying a market rate of Rs.25/- per kg. thereby showing the value of rolls at Rs.98,197/- and claimed the balance amount as deduction by way of terminal allowance. According to the department, there being no other items of rolls as per the balance-sheet and as

per the material on record, the assessee had used only the devalued rolls in its manufacturing process and, therefore, it cannot be said that such rolls were discarded; and when they were not discarded, no terminal allowance could have been allowed.

Submission of the Department has been contested on behalf of the assessee with the submissions that the case does not give rise to any question of law; that the assessee was competent to decide about utility of the rolls and in view of their substantial devaluation in the earlier years, the assessee had rightly discarded the same and the claim for terminal allowance has rightly been allowed by the Tribunal. Learned counsel for the assessee has relied upon a decision of Hon'ble Gujarat High Court in Commissioner of Income-Tax, Gujarat Vs. Nagari Mills Ltd.: 127 ITR 230 and submitted that the only requirement of clause (iii) of Section 32(1) is the factum of plant and machinery being discarded by the assessee accompanied by writing off of the same in the books of accounts. Whether an alternative was available or not were the questions to be decided on commercial consideration by the assessee and it is not the requirement of law that discarding should be to the satisfaction of the income tax authorities.

During the course of submissions, at our request, learned counsel for the assessee has placed on record a

photostat of the disputed accounting entry relating to the said amount of rolls that are claimed to be discarded by the assessee but are said to be merely revalued by the Department. The entry in question reads thus:

> "श्री रोल खाते जमा वलता श्री रौल रीपेयर व घिसाई खाते लेखे सं. 2035, 2036 व 2037 में घिसाई क्रमश: 10; 15; 10% सुजमा खर्च कीवी परन्तु सं.2038 में कुल रौल स्टोक का वजन 3927.500 किलो था जिसमें से बहुत से रौल पतले है अत: इनका मार्केट वेल्यू लगभग @ 25 प्रति किलो से इनकी कीमत 98187.50 अर्थात् 98188/- हुई अत: रौल खाते की रकम 2,29,491/- में से 98188/- घटाकर शेष रकम 131303/- रौल रीपेयर व घिसाई खाते लेखे मांडी."

Having given a thoughtful consideration to the rival submissions and having examined the record, we are not satisfied with the correctness of the decision of the Appellate Tribunal and in the circumstances of the case, we are of the opinion that the Tribunal ought to state the case and refer the same to us on the question as proposed by the Department.

A perusal of the order passed by the AO makes it clear that in the rolls accounts there had been certain additions in the assessment years 1980-81 and 1981-82; but there has not been any addition in the assessment year 1982-83 and so also in the assessment year 1983-84 (the year under consideration). The opening balance of the rolls account for the assessment year 1983-84, has been Rs.2,29,491/- and the assessee has found their weight at 3927.500 kg and large number of them having gone thinner and has calculated their

market value at the rate of Rs.25/- per kg. at Rs.98,188/-. After deducting this amount from the opening balance, the assessee has debited entire of the remaining amount of Rs.1,31,303/- towards repairs and depreciation.

The copper rolls in question being essential part of the machinery for the manufacturing process undertaken by the assessee is a fact not in dispute. It is also not in dispute that no new rolls were purchased during the year under consideration. It is also not in dispute that the assessee has continued with its manufacturing process during the relevant year. It becomes a serious question for consideration if the aforesaid accounts entry could be said to be only of revaluation as claimed by the Department or of discarding of the rolls as claimed by the assessee.

The AO and the Appellate Commissioner have disallowed such claim for terminal allowance on the finding that it was a matter of revaluation only; and the AO has given cogent reasons for such finding that taking the rolls as discarded would stand contrary to the fact that the manufacturing process did continue in the relevant year though no new rolls were purchased. We have noticed that the Tribunal has proceeded directly on the assumption that the amount of Rs.1,31,305/- was that of 'discarded copper rolls' and has further observed that merely because no new rolls were purchased does not mean that written off rolls were used

because assessee was having a stock of usable rolls with it. The Tribunal has totally missed the point that there was no other stock of usable rolls but entire of the rolls valued at Rs.2,29,491/- has been taken up in the said accounting entry; and after deducting their market value calculated at Rs.25/- per kg., entire of the remaining amount has been claimed towards terminal allowance. The proposition of discarding, as stated by the assessee, and accepted by the Tribunal, appears to be seriously questionable. If entire of the stock of rolls were accepted to have been discarded, the question obviously would be as to how the manufacturing process was undertaken? The Tribunal has proceeded on assumption about availability of other usable rolls; and such assumption is fundamentally contrary to the record.

The decision relied upon by the learned counsel for the assessee cannot be considered having direct application to the facts of the present case. The assessee therein had sunk a bore-well that had written down value of Rs.46,414/- after years to year depreciation. The bore-well was treated as part of the plant of the assessee but in the year under consideration the assessee discarded the same, for it was found that the water from the said bore-well was hard and not suitable and after writing off the said bore-well claimed balance amount under Section 32(1)(iii). The Tribunal disallowed the claim on the ground that the assessee has not

brought any evidence to show that the water from the said bore-well could not have been used for any other purpose; that the assessee had not produced any evidence that installation of a softening plant was commercially inexpedient; and that the said bore-well had not been discarded or destroyed. The Hon'ble Gujarat High Court was of opinion that the only thing that Section 32(1)(iii) calls for is that there should be a factum of discarding accompanied by the actual writing off of the discarded building, machinery, plant or furniture and that desirability of discarding or putting the machinery to some more years of service has to be taken by the assessee alone. However, the Hon'ble Court further observed,-

> ''Of course, if they come to the conclusion that discarding was a device to evade income-tax, they can disallow the claim of the assessee on this ground but that can be done only upon the factum of discarding rather than advisability or desirability of discarding of a particular asset, if it otherwise falls under s.32(1)(iii).''

In the case at hands, the question of advisability or desirability of so-called discarding is not at all germane to the issue involved. As noticed, the copper rolls were essential parts of machinery for manufacturing process and the Tribunal has proceeded on an incorrect premise as if usable rolls were available with the assessee other than those in relation whereof terminal allowance was claimed. Whether it is a matter of discarding or revaluation does definitely require

consideration. In the aforesaid view of the matter, we are clearly of opinion that the question posed by the Department does arise for consideration in this case.

Though the present one is an old matter but having regard to the factual aspects involved, we would like the Appellate Tribunal to draw up the case with all necessary facts and particulars for decision by this Court; and it does not appear appropriate to take up the proposition of deciding the case on merits at this stage as feebly suggested by the learned counsel during the course of arguments.

Accordingly, this reference application is allowed; and the Appellate Tribunal is required to state the case and refer the same to this Court keeping in view the observations made hereinabove and on the question as noted at the outset.

(DINESH MAHESHWARI), J. **(P.B.MAJMUDAR),J.**

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