(2015) 03 GUJ CK 0002

In the Gujarat High Court

Case No : Tax Appeal No. 142 of 2015

Commissioner of Income Tax APPELLANT

Vs

Akar Laminators Ltd. RESPONDENT

Date of Decision : 03-03-2015

Acts Referred:
Income Tax Act, 1961 — Section 144, 36(1)(iii)

Citation : (2015) 377 ITR 394

Hon'ble Judges : Jayant M. Patel and S.H. Vora, JJ.

Bench : Division Bench

Advocate : Mauna M. Bhatt, Advocate, for the Appellant

Judgement

Jayant M. Patel, J.—The Revenue has preferred the present appeal by raising the following questions:

"(A) Whether the Appellate Tribunal has substantially erred in remanding the issue of disallowance of loss of Rs. 2,11,82,046 to the file of the Assessing Officer without giving any independent finding and cogent reasons as to how the Commissioner of Income-tax (Appeals)''s finding were incorrect despite the Tribunal being the final fact finding authority?

(B) Whether the Appellate Tribunal has substantially erred in remitting the issue of disallowance of claim of the revenue expenses of Rs. 3,10,49,616 to the file of the Assessing Officer without giving any independent finding and cogent reasons as to how the Commissioner of Income-tax (Appeals)''s finding were incorrect despite the Tribunal being the final fact finding authority?

(C) Whether the Appellate Tribunal has substantially erred in disallowance of claim, rebate and reversal of claims of Rs. 3,92,66,819 to the file of the Assessing Officer without giving any independent finding and cogent reasons as to how the Commissioner of Income-tax (Appeals)''s finding were incorrect despite the Tribunal being the final fact finding authority?

(D) Whether the Appellate Tribunal has substantially erred in remitting the issue of disallowance of claim of writing off Rs. 64,504 to the file of the Assessing Officer without giving any independent finding and cogent reasons as to how the Commissioner of Income-tax (Appeals)''s finding were incorrect despite the Tribunal being the final fact finding authority?

(E) Whether the Appellate Tribunal has substantially erred in remitting the issue of the disallowance of Rs. 2,25,73,649 under section 36(1)(iii) of the Act to the file of the Assessing Officer without giving any independent finding and cogent reasons as to how the Commissioner of Income-tax (Appeals)''s finding were incorrect despite the Tribunal being the final fact finding authority?

(F) Whether the Appellate Tribunal has substantially erred in remitting the issue of hire charges of Rs. 5,24,421 to the file of Assessing Officer following the order of the co-ordinate Bench of the Tribunal for the assessment year 1999-2000?"

We have heard Mrs. Mauna Bhatt, learned counsel appearing for the appellant-Revenue.

2. On question A, it appears that the Assessing Officer in view of the fact that no evidence was produced as it was called upon by the Assessing Officer, he invoked the power under section 144 of the Income-tax Act (hereinafter referred to as "the Act") and then disallowed the claim for gross loss to the fullest extent. In the appeal before the Commissioner of Income-tax (Appeals), the view of the Assessing Officer was concurred but the relevant aspect is that there was no examination of the material on record in appeal. The Tribunal recorded the finding at paragraph 9, which reads as under:

"9. We have heard the rival submissions and perused the material on record. We find that the Assessing Officer has noted that the assessee was asked to justify the claim of loss, which the assessee had failed to do. Further, the assessee did not produce the books of account for examination by the Assessing Officer. We also find that even before the Commissioner of Income-tax (Appeals), no material has been placed on record by the assessee to substantiate its claim of loss. It is a fact that in the absence of details the entire gross profit has been disallowed by the Assessing Officer which we feel is unjustified. Before us, learned authorised representative has submitted that working of gross profit at paper book page 20 according to which the gross profit is at 4.14 per cent. Since this detail of working needs examination. We, therefore, remit the issue back to the file of the Assessing Officer to verify the working and the submission of the assessee and, thereafter, decide the issue in accordance with law. Thus, this ground of assessee is allowed for statistical purposes."

3. The aforesaid shows that the Tribunal having found that the gross profit even as per their representative was 4.14 per cent, it was required for the Assessing Officer to verify and the matter is, therefore, remanded to the Assessing Officer. The Tribunal also found the fact that in the absence of details, the entire gross profit could not have been disallowed by the Assessing Officer and the Tribunal

found such an approach on the part of the Assessing Officer as unjustified.

4. Learned counsel for the Revenue submitted that if the documents were not produced, the Assessing Officer was justified in disallowing the entire gross profit and the Commissioner of Income-tax (Appeals) had rightly conferred with the view of the Assessing Officer. She submitted that the Tribunal, which is ultimate fact finding authority ought to have appreciated the evidence on record and ought to have given the finding of fact as to what extent, the disallowance of the loss could be made and instead that the Tribunal has given second innings to the assessee, which in her submission, was impermissible. She relied upon the decision of this court in the case of Rajesh Babubhai Damania Vs. Commissioner of Income Tax, and, therefore, she submitted that the, appeal deserves consideration on the said question raised.

5. In our view, even if the notice was issued calling upon the assessee to produce certain documents and the assessee failed to produce the document, the power by the Assessing Officer was required to be exercised judiciously to examine and to find out to what extent, the disallowance could be made but it could not be to the fullest extent that too without any discussion and on a mere ground that the assessee failed to produce the document in support thereof: The aforesaid aspect was not appreciated in the appeal and, therefore, the Tribunal has remanded the matter. It is not that in every case, the Tribunal may examine the material on its own if there is failure to consider the material by the Assessing Officer or in appeal by the Commissioner of Income-tax (Appeals). Had it been a case where some material was considered and a finding was recorded by the Assessing Officer, it may stand on a different footing and different consideration. But when no material whatsoever was considered and just an adverse inference was drawn in disallowing the claim and such was not interfered in the appeal, if the Tribunal has exercised the discretion of remanding the matter in view of the reasons recorded hereinabove, such an exercise of discretion could not be said to be perverse. We do not find that any substantial question of law would arise on such a point.

6. The attempt to rely upon the decision of this court in the case of Rajesh Babubhai Damania (supra) is ill-founded because in the said case, the Commissioner of Income-tax (Appeals), at the appellate stage, had already examined the material and had given finding of facts, which was not appreciated by the Tribunal after considering the material and, therefore, the observations were made by this court in the said decision. Such are not the fact situation in the present case since no material is examined neither by the Assessing Officer nor by the Commissioner of Income-tax (Appeals). Hence, we do not find that substantial question, as canvassed, would arise for consideration in the present appeal.

7. On question B, it appears that the Assessing Officer adopted the same approach as has been considered by us while considering question A. In the appeal before the Commissioner of Income-tax (Appeals), similar consequence

has arisen for disallowance. The Tribunal at paragraph 19 observed thus:

"19. We have heard the rival submissions and perused the material on record. We find that the assessee has not produced any material before the Assessing Officer or the Commissioner of Income-tax (Appeals) in support of his claim. Before us, it is the learned authorised representative''s submission that it had already made the disallowance. Since the aforesaid submission has not been examined by the Assessing Officer, we feel that this factual aspect needs re-examination. We, therefore, remit the matter back to the file of the Assessing Officer for ascertaining the factual position. If the submission of the learned authorised representative is found correct, then the addition made be deleted. The assessee is also directed to submit all the required details before the Assessing Officer. In case, the assessee fails to furnish the required details, the Assessing Officer is free to decide the matter on the basis of the material on record. Thus, this ground of the assessee is allowed for statistical purposes."

8. We find that considering the facts and circumstances, as observed by us while considering question A, the discretion exercised by the Tribunal cannot be said to be perverse, which may call for interference in the present appeal before us, which is limited to substantial questions of law. No substantial questions of law would arise as canvassed.

9. On question C, more or less, similar situation has arisen as considered by us while considering questions A and B, inasmuch as, the Assessing Officer disallowed the total claim. In the appeal, the approach of the Assessing Officer is upheld. The Tribunal in the further appeal has recorded the finding on paragraph 24, which reads as under:

"24, We have heard the rival submissions and perused the material on record. We find that the Assessing Officer, while disallowing the claim, has noted that the assessee has failed to submit any details or justification about expenditure. We also find that the Commissioner of Income-tax has also noted that no details were submitted and whether amounts were ever offered as income or not. Before us, it is submitted that the issue is covered by the decision of the hon''ble apex court in the case of T.R.F. Ltd. (supra). Since the aforesaid submission was not made before the lower authorities by the assessee, we feel that the issue needs re-examination. We, therefore, remit the issue back to the file of the Assessing Officer to decide the issue in the light of the decision of the apex court in the case of T.R.F. Ltd. (supra) and in accordance with law. The assessee is also directed to furnish the required details promptly to the Assessing Officer. In case, the assessee fails to furnish the required details, the Assessing Officer shall be free to decide the matter on the basis of the material available on record. Thus, this ground of the assessee is allowed for statistical purposes."

10. The aforesaid shows that the Tribunal having found that the examination was required on the part of the Assessing Officer to decide the issue in the light of the decision of the apex court in the case of T.R.F. Ltd. (supra) and, therefore,

the discretion has been exercised for sending the matter back to the Assessing Officer. Such an exercise of discretion cannot be said to be perverse. No substantial questions of law would arise for consideration as canvassed.

11. On question D, the Assessing Officer disallowed the claim in the absence of the evidence produced. In appeal before the Commissioner of Income-tax (Appeals), no interference was made to the approach of the Assessing Officer. The Tribunal in further appeal, observed at paragraph 29 as under:

"29. We have heard the rival submissions and perused the material on record. We find that the Assessing Officer, while disallowing the claim, has noted that the assessee has failed to submit any details or justification about the expenditure. We also find that the Commissioner of Income-tax (Appeals) has also noted that no details were submitted and whether the amounts were ever offered as income or not. Before us, it is submitted that the issue is covered by the decision of the hon''ble apex court in the case of T.R.F. Ltd. (supra). Since the aforesaid submission was not made before the lower authorities by the assessee, we feel that the issue needs reexamination. We, therefore, remit the issue back to the file of the Assessing Officer to decide the issue in the light of the decision of the apex court in the case of T.R.F. Ltd. (supra) and in accordance with law. The assessee is also directed to furnish the required details promptly to the Assessing Officer In case, the assessee fails to furnish the required details, the Assessing Officer shall be free to decide the matter on the basis of the material available on record. Thus, this ground of the assessee is allowed for statistical purposes."

12. The aforesaid shows that the Tribunal having found that the matter was required to be examined in the light of the decision of the apex court in the case of T.R.F. Ltd. (supra), the discretion has been exercised relegating the matter to the Assessing Officer. We do not find that the exercise of discretion could be said as perverse. No substantial questions of law would arise as canvassed.

13. On question E, the Assessing Officer disallowed the claim for deduction of interest. In the appeal before the Commissioner of Income-tax (Appeals), no interference was made to the approach of the Assessing Officer. Whereas the Tribunal in the further appeal observed at paragraph 34 as under:

34. We have heard the rival submissions and perused the material on record. Before us, the learned authorised representative has submitted that the investments were made out of interest-free funds and not borrowed funds and on the other hand, we find that the Commissioner of Income-tax (Appeals) has given finding that the assessee does not have any surplus funds. In view of the contrary facts, we are of the view that the factual position needs to be re-examined. We, therefore, remit the matter to the file of the Assessing Officer to verify the factual position and more so about the availability of free funds at the time of making investments and, thereafter, decide the matter in accordance with law. We also direct the assessee to furnish all the required details or any other details in its support promptly to the Assessing Officer In case, the

assessee fails to furnish the required details, the Assessing Officer shall be free to decide the matter on the basis of the material available on record. Thus, this ground of the assessee is allowed for statistical purposes."

14. The aforesaid shows that the Tribunal found that the factual aspects including that of the availability of the free fund at the time of making investment was required to be examined and, therefore, the discretion has been exercised by the Tribunal to send the matter back to the Assessing Officer. We do not find that the discretion has been perversely exercised as canvassed. No questions of law would arise for consideration.

15. On the last question F, the Commissioner of Income-tax (Appeals) as well as the Tribunal has gone by the earlier decision including that of the Tribunal for the assessment year 1999-2000. The learned counsel for the Revenue has brought to our notice that the decision of the Tribunal, which has been relied upon for the assessment year 1999-2000, was carried before this court in Tax Appeal No. 896 of 2009 decided on February 21, 2011, and the said appeal has been dismissed, as no substantial question of law was found for consideration by this court. When this court has already examined the said aspect on the above referred tax appeal, we do not find that any substantial questions of law would arise for consideration as sought to be canvassed. In view of above, we do not find any case of interference in the impugned order passed by the Tribunal. The appeal being meritless is dismissed.