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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

\+ **Date of Decision: 28.11.2019**

% **ITA 259/2018**

CUREWEL (INDIA) LTD. ..... Appellant
Through: Mr. G.C. Srivastava, Mr. Suvinay Dash and Mr. Siddharth, Advocates.

versus

INCOME TAX OFFICER ..... Respondent
Through: Ms. Vibhooti Malhotra and Mr.Siddharth Manocha, Advocates.

CORAM:
HON'BLE MR. JUSTICE VIPIN SANGHI
HON'BLE MR. JUSTICE SANJEEV NARULA

VIPIN SANGHI, J. (ORAL)

1. The following questions of law arise for our consideration:

"I. Whether, in the facts and circumstances of the case and in law, the ITAT erred in upholding the action of the CIT(A) in refusing to adjudicate on the issue of non-taxability of income on account of waiver of loan payable by the appellant to Canara Bank, without going into the merits of such claim?

II. Whether, in the facts and circumstances of the case and in law, the ITAT erred in not appreciating that the earlier remand order of the ITAT was a de novo remand order and not specific to any issue and therefore the appellant could have raised a fresh claim before the AO in the set aside proceedings?"

2. We have heard learned counsels and proceed to answer the aforesaid questions. The Assessing Officer passed the assessment order in respect of the assessment year 2002-03 under Section 144 of the Income Tax Act on

30.03.2005. Eventually, on 07.01.2009, the Income Tax Appellate Tribunal (ITAT) set aside the matter to the file of the Assessing Officer to adjudicate afresh after considering the documents and submissions of the assessee. The Assessing Officer then passed a fresh assessment order on 01.12.2009 under Section 143(3) read with Section 254 of the Act, making certain additions and disallowances. The said order was upheld by the CIT (A) on 20.10.2010.

3. On further appeal, once again, the ITAT vide order dated 10.03.2011, set aside the matter to the file of the Assessing Officer with a direction to re-framing a fresh assessment. While passing this order, the Tribunal observed in paragraph 5 as follows:

> *"5. We have heard rival submissions and have gone through the entire material available on record. As the facts emerge, assessee stipulates that the finding of lower authorities that books of account were not maintained, is not correct, as assessee is willing to produce the books of account before ITAT also. Further, we find merit in the argument of learned counsel that even in a case of best judgment assessment, in absence of accounts and record the AO cannot adopt an arbitrary and ad hoc approach. The assessee being regularly assessed to tax, its earlier and subsequent record will be there and a best judgment assessment could have been properly made on that basis. We see no justification in summarily disallowing the entire manufacturing, administrative, selling & finance charges and further adding back share capital, unsecured loans, current liabilities and addition to fixed assets. The approach adopted by lower authorities in making these additions is highly unjustified and regrettable. The lower authorities being quasi judicial authorities, are under obligation to be fair and judicious. In view of these facts and circumstances, we are of the view that the present assessment*

being excessive, harsh and arbitrary, deserves to be set aside, restored back to the file of AO to reframe the same afresh. Assessee is willing to produce the books of account which are to be considered after affording an opportunity to the assessee. In an eventuality where best judgment assessment is inevitable, then fair and reasonable approach as warranted by law has to be adopted by lower authorities, which the AO will keep in mind while reframing the assessment. We order accordingly."

4. On this occasion, the Assessing Officer deleted the additions and the disallowances made in the first two rounds. A fresh addition of Rs. 40,045/- was made towards late deposit of employees contribution towards PF and ESI, and brought forward losses to the extent of Rs. 2,14,35,459/- were not allowed to be set off. The assessee made a fresh claim regarding non-taxability of income arising from write-off of liability by Canara Bank in its favour amounting to Rs. 1,36,45,525, which earlier had been offered to tax as income. The Assessing Officer without examining the said claim of the assessee, rejected the same at the threshold on the ground that in remand proceedings, the assessee could not raise a fresh claim. The appeal preferred by the assessee before the CIT (A) was rejected on 19.07.2013.

5. By the impugned order dated 30.06.2017, the ITAT in ITA No. 5346/Del/2013 upheld the order of the CIT (A). The ITAT, in the impugned order, inter alia, observed as follows:

"*8. We have heard the rival submissions and perused the relevant material on record including the order of the lower authorities and the orders of the Tribunal, in which matter was restored to the file of the Assessing Officer. It is undisputed fact that appeal of the assessee has been restored back to the file of the Assessing Officer twice. From the facts of the case, it is also evident that the additions which were*

made in the first and second round of assessment proceedings by the Assessing Officer, have not been made in present round of proceedings. Thus the additions which are agitated by the assessee in first and second round proceedings and restored back to the Assessing Officer, no longer existing in this appeal, which means the Assessing Officer has allowed relief to the assessee on those issues.

9. But in remand proceeding before the Assessing Officer, consequent to the second order of the Tribunal dated 10/03/2011, the assessee made a fresh claim for allowing deduction of Rs.1,36,45,525/- being the liability of the Canara bank, written back by the company as same should not be treated as income of the assessee. The question before us is whether the assessee should be allowed to make fresh claim of deduction in remand proceedings and that too in second round of remand by the Tribunal."

6. The Tribunal went on to answer the question raised by it against the assessee by placing reliance on a decision of the Gujarat High Court in ***Sehet Synthetics P. Ltd. v. CIT***, 302 ITR 126.

7. The submission of learned counsel for the appellant is that a perusal of the order of remand dated 10.03.2011 would show that the ITAT had completely set aside the assessment order on a fundamental premise, namely, on finding the approach of the lower authorities - which included the Assessing Officer, to be "highly unjustified and regrettable". The Tribunal had found the assessment to be excessive, harsh and arbitrary. The assessment order and the first appellate order were set aside and "*restored to the file of the Assessing Officer to frame the same afresh*". The assessee was permitted to produce its books of accounts and was required to be granted an opportunity for that purpose. Since the original assessment had been framed on Best Judgment Basis, and the assessee claimed that its books of accounts

were available for the relevant assessment year, the Tribunal held that in the eventuality, the Best Judgment Assessment is inevitable, then fair and reasonable approach, as warranted by law, has to be adopted by lower authorities and that the Assessing Officer should keep the same in mind while re-framing the assessment.

8. Learned counsel submits that in view of the aforesaid, the finding returned by the Tribunal in the impugned order that the remand to the Assessing Officer vide the earlier order dated 10.03.2011 was limited, is incorrect. Reliance placed on ***Sehet Synthetics P. Ltd.*** (supra) was also misplaced in view of the complete remand in the present case. He further submits that, in fact, the Assessing Officer had also made fresh additions while passing the fresh assessment order, precisely on the same basis that a fresh assessment was being framed. Else, the Assessing Officer could not have made fresh additions of Rs. 40,045/- towards late deposit of employees contribution towards PF and ESI, and could not have disallowed set-off of the brought forward losses to the extent of Rs. 2,14,35,459/-.

9. On the other hand, Ms. Malhotra submits that the Assessing Officer had not examined the merits of the fresh claim made by the assessee regarding non-taxability of income arising from write-off of liability by Canara Bank in its favour amounting to Rs. 1,36,45,525/-, on the threshold objections that in remand proceedings a fresh claim could not be raised by the assessee.

10. Having heard learned counsels and perused the impugned order as well as the order dated 10.03.2011 passed by the ITAT in ITA No.

04/Del/2011 preferred by the assessee, it is clear to us that the remand made by the Tribunal to the Assessing Officer vide order dated 10.03.2011 was a complete and wholesale remand for framing a fresh assessment. The remand was not limited in its scope and was occasioned upon the Tribunal finding the approach of the Assessing Officer and the CIT (A) to be excessive, harsh and arbitrary. The earlier assessment had been framed on the basis of Best Judgment without examining the books of accounts of the assessee, which the assessee has claimed were available.

11. That being the position, the Assessing Officer ought to have evaluated the claim made by the assessee for write-off of liability by Canara Bank in its favour amounting to Rs. 1,36,45,525/-, and should not have rejected the same merely on the ground of it being raised for the first time. The reliance placed by the Tribunal on ***Sehet Synthetics P. Ltd.*** (supra) is misplaced in the light of the scope and nature of remand in the present case. The finding returned by the Tribunal in paragraphs 8, 9 and 12 of the impugned order are erroneous since the Tribunal has not appreciated the scope and nature of the remand ordered by it by its earlier order dated 10.03.2011.

12. We, therefore, answer the questions framed aforesaid in favour of the assessee and set aside the impugned order. Since the Assessing Officer has not evaluated the appellant's claim regarding non-taxability of income arising from write-off of liability by Canara Bank in its favour amounting to Rs. 1,36,45,525/- on merits, we remand the matter back to the Assessing Officer for evaluation of the said claim on its own merits.

13. We make it clear that we have not made any observations on the merits of the said claim.

VIPIN SANGHI, J

SANJEEV NARULA, J

NOVEMBER 28, 2019
B.S.Rohella