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IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

R/TAX APPEAL NO. 162 of 2021

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PRINCIPAL COMMISSIONER OF INCOME-TAX, VADODARA 3

Versus

M/S BELL CERAMICS LTD.

==========

Appearance:

MR.VARUN K.PATEL(3802) for the Appellant(s) No. 1

for the Opponent(s) No. 1

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CORAM:**HONOURABLE MS. JUSTICE BELA M. TRIVEDI** and

HONOURABLE DR. JUSTICE ASHOKKUMAR C. JOSHI

Date : 15/07/2021

ORAL ORDER

(PER : HONOURABLE MS. JUSTICE BELA M. TRIVEDI)

1. The present Tax Appeal filed by the appellant - The Principal Commissioner of Income-Tax, Vadodara-3, under section 260A of the Income-Tax Act, 1961 (hereinafter referred to as 'the said Act') is directed against the impugned order dated 30.09.2019 passed by the Income Tax Appellate Tribunal (hereinafter referred to as 'ITAT') IN ITA No. 2283/Ahd/2010 for the A.Y. 2006-07 in case of the respondent - assessee.

2. The learned Senior Standing Counsel Mr. Varun K. Patel for the appellant has proposed the following two substantial questions of law in the present appeal : -

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"(a) Whether the impugned order of the ITAT is erroneous, illegal and non-speaking as the ITAT has not assigned any independent reasons while confirming the deletion of addition of Rs. 4,09,60,104/- on account of discrepancy in stock and Rs. 4,07,214/- being estimated value of scrap made by the Assessing Officer ?

(B) Whether the ITAT has committed gross error of law in passing the impugned order with respect to deletion of addition on account of discrepancy in stock and estimated value of scrap after following its decision in the impugned order in Revenue's Appeal for A.Y. 2003-04 in assessee's own case though no such revenue's appeal for the A.Y. 2003-04 has been decided by the impugned order and merely the assessee's appeals for A.Y. 2003-04 (being ITA No. 1993/Ahd/2010 and ITA No. 1551/Ahd/2014) involving completely different issues were decided by the ITAT ?"

3. The Additional Commissioner of Income Tax, Bharuch Range, Bharuch being the Assessing Officer had passed the Assessment order on 26.12.2008 under section 143(3) of the said Act in case of the respondent – assessee for the A.Y. 2006-07, whereby the Assessing Officer had made following observations with regard to the discrepancy of stock : -

"6.4 The explanation of the assessee is not acceptable because of the following reasons :

6.5 The assessee has stated that there are various losses of weight loss, process loss, ignition loss etc. during the manufacturing process, however, as per tax audit report u/s 44AB of the IT Act, the auditor has not filed

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up any figure of shortage in the quantitative details furnished. In view of the above reasons, discrepancy in stock is to be added to the total income. However, certain allowance for wastage / manufacturing loss etc. needs to be given.

As per annual report, the value in Rupees for raw material consumed is as under : -

Body material	*1777.42 Lacs*
Glazes, Frits & Chemicals	*2805.56 Lacs*
Total	*4582.98 Lacs*

Quantity as per Tax Audit Report

Consumption of raw material as per Tax Audit Report in M.T.

Dora Unit		
Body material	*71337.84*	
Glazes, Frits & Chemicals	*3345.40*	
Total	*74683.24*	*.....(A)*
Hoskote Unit		
Body material	*124738*	
Glazes, Frits & Chemicals	*6218*	
Total	*130956*	*.....(B)*
Total (A) & (B)	***205639.24 M.T.***	

Working of value in Rupees

4582.98 Lacs = *0.022 Lacs*
205639.24 M.T.

= *Rs. 2229 Per Mertic Tone*

Consumption working furnished by assessee during assessment proceedings

Consumption of Raw material in M.T.

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Dora Unit	*65275 M.T.*
Hoskote Unit	*117420 M.T.*
	182695 M.T.

Difference between consumption of raw material as per return and as per working submitted during assessment proceedings : -

As per return of Income	*205639 M.T.*
Less : As per working	*182695 M.T.*
Discrepancy	*22944 M.T.*

Discrepancy in Rupees 22944 M.T. x Rs. 2229
= Rs. 5,11,42,176/-

Therefore discrepancy in terms of % is as under:

Dora Unit

$$\frac{9408\ M.T.}{65275\ M.T.} \times 100 = 14.41\%$$

Hoskote Unit

$$\frac{13536\ M.T.}{117420\ M.T.} \times 100 = 11.52\%$$

After considering all the facts and circumstances of the case and thereafter taking into consideration of all possible wastage, 2.5% is most appropriate and reasonable for both Dora and Haskote Unit.

Dora Unit	*65275 x 2.5% = 1632 M.T.*
Hoskote Unit	*117420 x 2.5% = 2936 M.T.*

Discrepancy after taking into account wastage / shortage is :

Dora Unit	=	*9408 M.T. - 1632 M.T.*
	=	*7776 M.T.*
Hoskote Unit	=	*13536 M.T. - 2936 M.T.*
	=	*10600 M.T.*

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Value in Rupees

Dora Unit	=	*7776 M.T. x Rs. 2229 per Metric Tone*
	=	*Rs. 1,73,32,704/-*
Hoskote Unit	=	*10600 M.T. x Rs.2229 per Metric Tone*
	=	*2,36,27,400/-*

The total of Two Units is Rs. 4,09,60,104/- which is added to the total stock on account of discrepancy in consumption of raw material after taking into account all possible wastage."

4. Thus, the Assessing Officer after considering the value of the raw material consumed as per the annual report and the difference between the consumption of raw material as per the return and as per the working submitted in the assessment proceedings as also taking into considering all possible wastage, held that the discrepancy in respect of the two units i.e. Dora Unit and Hoskote Unit was Rs. 4,09,60,104/- which was to be added to the total stock on account of discrepancy.

5. Being aggrieved by the said order passed by the Assessing Officer, the respondent – assessee had preferred an Appeal being No. CAB/VI-398/08-09 before the Commissioner of Income-Tax (Appeals)-VI, Baroda. The CIT(Appeals) observed as under, with regard to the addition of Rs. 4,09,60,104/- on account of discrepancy of stock and Rs. 4,07,214/- being estimated value of

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scrap as on the last day of the accounting year : -

> *"4. Grounds No. 2 & 3 relate to addition of Rs. 4,09,60,104/- on account of discrepancy in stock and Rs.4,07,214/- being estimated value of scrap as on the last day of the accounting year, respectively.*
>
> *4.1 In appeal, it was submitted by the ld. AR that identical additions were made by the AO for AY 2003-04. The appellant had challenged the action of the AO for AY 2003-04 and the CIT(A) had decided the issues in favour of the appellant. Since the facts of making the addition were same, it was submitted that the additions are required to be deleted following the order of the CIT(A) for AY 2003-04 in the case of the appellant.*
>
> *4.2 I have considered the submissions of the ld. A.R. and the facts of the case. It is true that on similar grounds addition was made by the AO for AY 2003-04. In A.Y. 2003-04 in the case of the appellant, I have deleted the additions made by the AO. Since the facts remain the same, the additions are deleted for the current year also."*

6. Being aggrieved by the said order passed by the CIT(Appeals), the appellant – Revenue preferred an appeal being No. 2283 of 2010 in respect of the A.Y. 2006-07, before the ITAT. The ITAT passed the common impugned order on 30.09.2019 in respect of the Appeals filed by the respondent – assessee as well as by the appellant Department, for the various assessment

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orders i.e. A.Ys. 1998-99, 1999-2000, 2001-02, 2003-04, 2005-06, 2006-07 and 2007-08. So far as the appeal of the Revenue being No. ITA No. 2283 of 2010 for the A.Y. 2006-07 was concerned, the ITAT dismissed the same by observing as under: -

> *"112. Ground No. 1 is against the deletion of addition of Rs. 4,09,60,104/- on account of discrepancy in stock and Rs. 4,07,214/- being estimated value of scrap.*
>
> *113. We have heard the rival submissions and both the parties agreed that the facts are similar as in the case of A.Y. 2005-06 and 2003-04. Therefore, our findings as recorded for 2003-04 and 2005-06 in the appeal of the Revenue in the earlier part of this order would apply to this ground of appeal, accordingly this ground of appeal of Revenue is therefore dismissed.*
>
> *114. In the result, appeal of the Revenue for A.Y. 2006-07 is dismissed."*

7. Being aggrieved by the same, the present Tax Appeal has been filed by the Appellant.

8. The learned Senior Standing Counsel Mr. Varun K. Patel for the appellant submitted that the ITAT while dismissing the appeal of the revenue for the A.Y. 2006-07 had committed an error in observing that the findings recorded in the appeal of the Revenue for A.Y. 2003-04 in earlier part of the impugned order would apply to the said appeal for the A.Y. 2006-07, however, no such revenue's appeal for A.Y. 2003-04 was decided by the said common impugned order

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dated 30.03.2019. According to Mr. Patel, the appeal of Revenue for the A.Y. 2003-04 being ITA No. 2280 of 2010 was dismissed as withdrawn in view of the low tax effect vide the ITAT's order dated 23.08.2019. He further submitted that the ITAT vide the impugned common order dated 30.09.2019 had decided the other two appeals of the assessee for the year 2003-04, which were filed by the assessee on completely different issue. Under the circumstances, the impugned order passed by the ITAT not only suffers from non-application of mind but is also a non-speaking order.

9. Now, as stated hereinabove, the ITAT while dismissing the appeal of the revenue for A.Y. 2006-07, had observed that both the parties had agreed that the facts of case for A.Y. 2006-07 were similar as in the case of the A.Y. 2005-06 and 2003-04, and therefore, the findings recorded for the said two years in the appeal of the Revenue in the earlier part of the order would apply in the appeal filed for A.Y. 2006-07. It is true that the appeal of revenue for A.Y. 2003-04 was dismissed as withdrawn in view of low tax effect vide a separate order passed by the ITAT on 23.08.2019, and to that extent, the observation made by the ITAT in the impugned order with regard to A.Y. 2003-04 is not correct, nonetheless the ITAT has dismissed the appeal of Revenue for A.Y. 2006-07, also relying

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upon the findings recorded in the earlier part of the impugned order, with regard to the appeal being No. 2282 of 2010 of the Revenue filed for A.Y. 2005-06, which pertained to the similar issues of addition on account of discrepancy in stock and estimated value of scrap. The said observation / finding in respect of the appeal filed by the revenue in respect of A.Y. 2005-06 read as under : -

> *"105. We have heard the rival submissions and perused the material available on record. We find that the addition is based on arithmetic calculation and conversion of stock maintained in MT into sq. mtrs. Therefore, there has to be variation in the working of the assessee which was filed as the Assessing Officer wanted the same in a particular format. However, the Assessing Officer has not brought out any defects in maintenance of books of accounts. Therefore, mere arithmetic calculation made is not suffice for making addition. Further, the similar issue has been adjudicated in earlier part of this order for A.Y. 2003-04. Therefore, our findings given therein against the appeal of the Revenue, therefore following the same this ground of appeal is dismissed."*

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10. In view of the above, it is clear that on the basis of the findings recorded by the ITAT for the A.Y. 2005-06, in the earlier part of the impugned order, it has dismissed the appeal of the revenue for the A.Y. 2006-07. It has been observed by the ITAT that the addition with regard to the value of discrepancy of stock by

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the Assessing Officer was based on the arithmetic calculation and conversion of stock maintained in Metric tonne into sq. mtrs. and therefore there has to be variation in the working of the assessee, which was filed as the Assessing Officer wanted the same in a particular format. It has been further observed by the ITAT that the Assessing Officer has not brought out any defects in maintenance of books of accounts and therefore, mere arithmetic calculation made is not suffice for making addition. It is true that the reasons given in impugned order passed by the Tribunal are not happily worded and the order could have been passed using better and accurate language, nonetheless the findings recorded by the ITAT being findings of fact, the appeal cannot be entertained in absence of any substantial question of law being involved in the same.

11. It may be noted that the Appeal under Section 260A could be admitted only on the High Court being satisfied that the case involves a substantial question of law. The Supreme Court in the case of ***M. Janardhana Rao versus Joint Commissioner of Income Tax*** reported in ***(2005) 2 SCC 324***, while dealing with the scope of Section 260A of the Income Tax Act, 1961, observed as under : -

"14. Without insisting on the statement

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of substantial question of law in the memorandum of appeal and formulating the same at the time of admission, the High Court is not empowered to generally decide the appeal under Section 260A without adhering to the procedure prescribed under Section 260A. Further, the High Court must make every effort to distinguish between a question of law and a substantial question of law. In exercise of powers under Section 260A, the findings of fact of the Tribunal cannot be disturbed. It has to be kept in mind that the right of appeal is neither a natural nor an inherent right attached to the litigation. Being a substantive statutory right, it has to be regulated in accordance with law in force at the relevant time. The conditions mentioned in Section 260A must be strictly fulfilled before an appeal can be maintained under Section 260A . Such appeal cannot be decided on merely equitable grounds.

15. An appeal under Section 260A can be only in respect of a 'substantial question of law'. The expression 'substantial question of law' has not been defined anywhere in the statute. But it has acquired a definite connotation through various judicial pronouncements. In Sir Chunilal V. Mehta & Sons Ltd. v. Century Spinning & Mfg. Co. Ltd., AIR (1962) SC 1314, this court laid down the following tests to determine whether a substantial question of law is involved. The tests are: (1) whether directly or indirectly it affects substantial rights of the parties, or (2) the question is of general public importance, or (3) whether it is an open question in the sense that issue is not settled by pronouncement of this Court or Privy Council or by the Federal Court, or (4) the issue is not free from difficulty, and (5) it calls for a discussion for alternative view. There is no scope for

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interference by the High Court with a finding recorded when such finding could be treated to be a finding of fact.

12. Again the Supreme Court in case of ***Vijay Kumar Talwar versus Commissioner of Income Tax in (2011) 330 ITR 1*** considered the issue of substantial question in context of Section 260A of the IT Act and observed as under:

"18. It is manifest from a bare reading of the Section that an appeal to the High Court from a decision of the Tribunal lies only when a substantial question of law is involved, and where the High Court comes to the conclusion that a substantial question of law arises from the said order, it is mandatory that such question(s) must be formulated. The expression "substantial question of law" is not defined in the Act. Nevertheless, it has acquired a definite connotation through various judicial pronouncements. In Sir Chunilal V. Mehta & Sons, Ltd. Vs. Century Spinning and Manufacturing Co. Ltd., AIR 1962 SC 1314 a Constitution Bench of this Court, while explaining the import of the said expression, observed that:

> *"The proper test for determining whether a question of law raised in the case is substantial would, in our opinion, be whether it is of general public importance or whether it directly and substantially affects the rights of the parties and if so whether it is either an open question in the sense that it is not finally settled by this Court or by the Privy Council or by the Federal Court or is not free from difficulty or calls for discussion of alternative views. If the question is settled by the highest Court or the*

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general principles to be applied in determining the question are well settled and there is a mere question of applying those principles or that the plea raised is palpably absurd the question would not be a substantial question of law."

19. Similarly, in Santosh Hazari Vs. Purushottam Tiwari (2001)3 SCC 179 a three judge Bench of this Court observed that:

"A point of law which admits of no two opinions may be a proposition of law but cannot be a substantial question of law. To be "substantial" a question of law must be debatable, not previously settled by law of the land or a binding precedent,AIR 1962 SC 1314 (2001) 3 SCC 179 and must have a material bearing on the decision of the case, if answered either way, insofar as the rights of the parties before it are concerned. To be a question of law "involving in the case" there must be first a foundation for it laid in the pleadings and the question should emerge from the sustainable findings of fact arrived at by court of facts and it must be necessary to decide that question of law for a just and proper decision of the case. An entirely new point raised for the first time before the High Court is not a question involved in the case unless it goes to the root of the matter. It will, therefore, depend on the facts and circumstance of each case whether a question of law is a substantial one and involved in the case, or not; the paramount overall consideration being the need for striking a judicious balance between the indispensable obligation to do justice at all stages and impelling necessity of avoiding prolongation in the life of any lis."

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20. In Hero Vinoth (Minor) Vs. Seshammal (2006) 5 SCC 545, 556, this Court has observed that:

> *"The general rule is that High Court will not interfere with the concurrent findings of the courts below. But it is not an absolute rule. Some of the well-recognised exceptions are where (i) the courts below have ignored material evidence or acted on no evidence; (ii) the courts have drawn wrong inferences from proved facts by applying the law erroneously; or (iii) the courts have wrongly cast the burden of proof. When we refer to "decision based on no evidence", it not only refers to cases where there is a total dearth of evidence, but also refers to any case, where the evidence, taken as a whole, is not reasonably capable of supporting the finding."*

21. A finding of fact may give rise to a substantial question of law, inter alia, in the event the findings are based on no evidence and/or while arriving at the said finding, relevant admissible evidence has not been (2006) 5 SCC 545 taken into consideration or inadmissible evidence has been taken into consideration or legal principles have not been applied in appreciating the evidence, or when the evidence has been misread. (See: Madan Lal Vs. Mst. Gopi & Anr. (1980) 4 SCC 855; Narendra Gopal Vidyarthi Vs. Rajat Vidyarthi (2009) 3 SCC 287; Commissioner of Customs (Preventive) Vs. Vijay Dasharath Patel (2007) 4 SCC 118; Metroark Ltd. Vs. Commissioner of Central Excise, Calcutta (2004) 12 SCC 505; West Bengal Electricity Regulatory Commission Vs. CESC Ltd. (2002) 8 SCC 715)."

13. If the facts of the present appeal are

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examined on the touchstone of the aforestated legal position, the Court is of the opinion that the Appeal does not involve any substantial question of law and hence deserves to be dismissed. In that view of the matter, the Appeal is dismissed.

(BELA M. TRIVEDI, J)

(A. C. JOSHI,J)

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