IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

R/TAX APPEAL NO. 790 of 2019

==========

THE PRINCIPAL COMMISSIONER OF INCOME TAX

Versus

KALPATARU POWER TRANSMISSION LTD.

==========

Appearance:
MRS MAUNA M BHATT(174) for the Appellant(s) No. 1
for the Opponent(s) No. 1

==========

CORAM: **HONOURABLE MR.JUSTICE J.B.PARDIWALA**
and
HONOURABLE MR. JUSTICE BHARGAV D. KARIA

Date : 06/01/2020

ORAL ORDER
(PER : HONOURABLE MR.JUSTICE J.B.PARDIWALA)

1. This Tax Appeal is filed under Section 260A of the Income Act, 1961 (for short the "Act") at the instance of revenue and it is directed against the order dated 10.05.2019 passed by the Income Tax Appellate Tribunal, Ahmedabad "C" Bench, Ahmedabad in ITA No.1462/Ahd/2016 for the assessment year 2010-2011.

2. The revenue has proposed solitary substantial question of law in its Memorandum of Appeal. The question formulated reads thus:-

> *"2(A) Whether the Appellate Tribunal has erred in the facts and circumstances of the case and in law, in upholding the order of the CIT(A) for deleting the addition of Rs.4,42,72,610/- in holding carbon receipts as capital receipts?"*

3. We take notice of the fact that the similar issue had arose in the case of very same assessee, so far as the assessment for the year 2009-10 is concerned, we refer to the order passed by this Court in the Tax Appeal No.141 of 2017 dated 02.03.2017. The relevant observations made in the said order reads thus:-

> *"[1.0] Feeling aggrieved and dissatisfied with the impugned judgment and order dated 18.03.2016 passed by the learned Income Tax Appellate Tribunal, Ahmedabad (hereinafter referred to as "Tribunal") in ITA No.538/Ahd/2013 for AY 200910, by which the learned Tribunal has dismissed the said appeal preferred by the Revenue and confirming the order passed by the learned CIT(A) deleting the addition of Rs.5,78,28,058/, the Revenue has preferred the present Tax Appeal with the following substantial question of law.*
>
> *"Whether the ITAT is right in law and on facts in deleting the addition of Rs.5,78,28,058/in holding carbon receipts as capital receipt?"*
>
> *However, considering the impugned judgment and order passed by the learned Tribunal, the correct proposed question of law would be as under:*
>
> ***"Whether the ITAT is right in law and on facts in confirming the order passed by the learned CIT(A) in deleting the addition of Rs.5,78,28,058/on the ground that the aforesaid income has not accrued / received by the assessee in the year under consideration?"***
>
> *[2.0] At the outset it is required to be noted that while passing the original assessment order the AO made the addition of Rs.5,78,28,058/on the ground that the carbon receipt receivable / accrued under the year under consideration is a capital receipt.*
>
> *[3.0] Feeling aggrieved and dissatisfied with the addition made by the AO of Rs.5,78,28,058/, the assessee preferred appeal before the learned CIT(A). That by detailed reasoned judgment and*

order the learned CIT(A) directed to delete the aforesaid addition of Rs.5,78,28,058/by observing that as there was no transfer / sale of the carbon receipts during the year under consideration and therefore, the same cannot be included in the year consideration. The learned Tribunal in an appeal preferred by the Revenue has confirmed the said order passed by the learned CIT(A) by specifically observing that as the carbon receipts were neither sold / transferred during the year under consideration and therefore, the same cannot be included in the income of the assessee in the year under consideration.

[3.1] Feeling aggrieved and dissatisfied with the impugned judgment and order passed by the learned Tribunal, the Revenue has preferred the present appeal to consider the above recast proposed question of law.

[4.0] We have heard Shri Sudhir Mehta, learned Counsel appearing on behalf of the Revenue and Shri S.N. Soparkar, learned Counsel appearing on behalf of the assessee. We have perused and considered the order passed by the AO as well as the orders passed by the learned AO as well as the orders passed by the learned CIT(A) as well as the impugned judgment and order passed by the learned Tribunal.

[4.1] Considering the order passed by the learned AO it appears that the AO made the addition of Rs.5,78,28,058/on the ground that the amount of Rs.5,78,28,058/was receivable and/or can be said to have been accrued in the year under consideration and therefore, the same is required to be included in the income of the assessee in the year under consideration. However, learned CIT(A) as well as the learned Tribunal have held that the carbon receipts were neither sold nor transferred by the assessee during the year under consideration and therefore, the same cannot be said to have been included in the income of the assessee in the year under consideration. As such whether when the amount can be said to have been accrued and/or is required to be included in the income of the assessee and in which year, is now not res-integra in view of the decision of the Hon'ble Supreme Court in the case of ***Commissioner of Income Tax vs. Excel Industries Limited reported in (2013) 358 ITR 295 (SC).*** *In the case before the Hon'ble Supreme*

Court, the question was whether advance license benefit and the Duty Entitlement Pass Book (DEPB) benefits were taxable in the year in which the same were actually utilized by the assessee or in the year of receipts. While considering the aforesaid question, in paras 13 to 27, the Hon'ble Supreme Court has observed and held as under:

> *"13. The Revenue then preferred an appeal under Section 260A of the Act in respect of the following substantial question of law:*
>
> *"Whether on facts and in circumstances of the case and in law ITAT is justified in law in holding by following its decision in the case of Jamshri Ranjitsinghji Spinning & Weaving Mills Ltd. (41 ITD 142), that advance license benefit and DEPB benefits are taxable in the year in which these are actually utilized by the assessee and not in the year of receipts."*
>
> *14. By the impugned order, the High Court declined to admit the appeal filed by the Revenue under Section 260A of the Act.*
>
> *15. It was submitted before us by learned counsel for the Revenue that in view of the provisions of Section 28(iv) of the Act, the value of the benefit obtained by the assessee is its income and is liable to tax under the head "Profits and gains of business or profession". We are unable to accept the contention of learned counsel for the Revenue for several reasons.*
>
> *16. Section 28(iv) of the Act reads as follows:"*
>
> > *"28. Profits and gains of business or profession.The following income shall be chargeable to income tax under the head "Profits and gains of business or profession"...*
> >
> > *(iv) the value of any benefit or perquisite, whether convertible into money or not, arising from business or the exercise of a profession;"*
>
> *17. First of all, it is now well settled that income tax cannot be levied on hypothetical income. In Commissioner of Income Tax vs. Shoorji Vallabhdas and Co., [1962] 46 ITR 144 (SC) it was held as follows:*
> *"Incometax is a levy on income. No doubt,*

> *the Incometax Act takes into account two points of time at which the liability to tax is attracted, viz., the accrual of the income or its receipt; but the substance of the matter is the income. If income does not result at all, there cannot be a tax, even though in bookkeeping, an entry is made about a 'hypothetical income', which does not materialise. Where income has, in fact, been received and is subsequently given up in such circumstances that it remains the income of the recipient, even though given up, the tax may be payable. Where, however, the income can be said not to have resulted at all, there is obviously neither accrual nor receipt of income, even though an entry to that effect might, in certain circumstances, have been made in the books of account."*

18. The above passage was cited with approval in Morvi Industries Ltd. vs. Commissioner of Incometax (Central), [1971] 82 ITR 835 (SC) in which this Court also considered the dictionary meaning of the word "accrue" and held that income can be said to accrue when it becomes due. It was then observed that: "..... the date of payment ..... does not affect the accrual of income. The moment the income accrues, the assessee gets vested with the right to claim that amount even though it may not be immediately."

19. This Court further held, and in our opinion more importantly, that income accrues when there "arises a corresponding liability of the other party from whom the income becomes due to pay that amount."

20. It follows from these decisions that income accrues when it becomes due but it must also be accompanied by a corresponding liability of the other party to pay the amount. Only then can it be said that for the purposes of taxability that the income is not hypothetical and it has really accrued to the assessee.

21. In so far as the present case is concerned, even if it is assumed that the assessee was entitled to the benefits under the advance licences as well as under the duty entitlement pass book, there was no corresponding liability on the customs authorities to pass on the benefit of duty free imports to the assessee until the goods

are actually imported and made available for clearance. The benefits represent, at best, a hypothetical income which may or may not materialise and its money value is therefore not the income of the assessee.

22. In Godhra Electricity Co. Ltd. vs. Commissioner of Income Tax, [1997] 225 ITR 746 (SC) this Court reiterated the view taken in Shoorji Vallabhdas and Morvi Industries.

23. Godhra Electricity is rather instructive. In that case, it was noted that the High Court held that the assessee would be obliged to pay tax when the profit became actually due and that income could not be said to have accrued when it is based on a mere claim not backed by any legal or contractual right to receive the amount at a subsequent date. The High Court however held on the facts of the case that the assessee had a legal right to recover the consumption charge in dispute at the enhanced rate from the consumers.

24. This Court did not accept the view taken by the High Court on facts. Reference was made in this context to Commissioner of Income Tax vs. Birla Gwalior (P.) Ltd., [1973] 89 ITR 266 (SC) wherein it was held, after referring to Morvi Industries that real accrual of income and not a hypothetical accrual of income ought to be taken into consideration. For a similar conclusion, reference was made to Poona Electric Supply Co. Ltd. vs. Commissioner of Income Tax, [1965] 57 ITR 521 (SC) wherein it was held that income tax is a tax on real income.

25. Finally a reference was made to State Bank of Travancore vs. Commissioner of Income Tax, [1986] 158 ITR 102 (SC) wherein the majority view was that accrual of income must be real, taking into account the actuality of the situation; whether the accrual had taken place or not must, in appropriate cases, be judged on the principles of real income theory. The majority opinion went on to say:

> *"What has really accrued to the assessee has to be found out and what has accrued must be considered from the point of view of real income taking the probability or improbability of realisation in a realistic manner and dovetailing of these factors together but once the accrual takes place, on the conduct of the parties*

subsequent to the year of closing an income which has accrued cannot be made "no income".

26. This Court then considered the facts of the case and came to the conclusion (in Godhra Electricity) that no real income had accrued to the assessee in respect of the enhanced charges for a variety of reasons. One of the reasons so considered was a letter addressed by the Under Secretary to the Government of Gujarat, to the assessee whereby the assessee was "advised" to maintain status quo in respect of enhanced charges for at least six months. This Court took the view that though the letter had no legal binding effect but "one has to look at things from a practical point of view." (See R.B. Jodha Mal Kuthiala vs. Commissioner of Income Tax, [1971] 82 ITR 570 (SC)). This Court took the view that the probability or improbability of realisation has to be considered in a realistic manner and it was held that there was no real accrual of income to the assessee in respect of the disputed enhanced charges for supply of electricity. The decision of the High Court was, accordingly, set aside. 27. Applying the three tests laid down by various decisions of this Court, namely, whether the income accrued to the assessee is real or hypothetical; whether there is a corresponding liability of the other party to pass on the benefits of duty free import to the assessee even without any imports having been made; and the probability or improbability of realisation of the benefits by the assessee considered from a realistic and practical point of view (the assessee may not have made imports), it is quite clear that in fact no real income but only hypothetical income had accrued to the assessee and Section 28(iv) of the Act would be inapplicable to the facts and circumstances of the case. Essentially, the Assessing Officer is required to be pragmatic and not pedantic."

[4.2] Applying the aforesaid law laid down by the Hon'ble Supreme Court to the facts of the case on hand, it cannot be said that the learned CIT(A) as well as the learned Tribunal have committed any error in deleting the addition of Rs.5,78,28,058/- and holding that as neither the carbon receipts were sold and/or transferred in favour of foreign companies in the year under consideration, the same cannot be included as receipt / income in the year under consideration. Under the circumstances, we

see no reason to interfere with the impugnedjudgment and order passed by the learned Tribunal. No substantial question of law arise in the present Tax Appeal."

4. Thus, in view of the aforesaid decision of this Court in the case of the very same assessee, this appeal fails and is hereby dismissed.

(J. B. PARDIWALA, J)

(BHARGAV D. KARIA, J)

GIRISH