

**JUDGEMENT RESERVED ON- 30.1.2019**

**JUDGEMENT DELIVERED ON-.13.02.2019**

**Case :- INCOME TAX APPEAL No. - 263 of 2012**

**Appellant :- M/S G.Surjiwear Limited**

**Respondent :- The Commissioner Income Tax  
Bareilly And Another**

**Counsel for Appellant :- Rakesh Ranjan  
Agarwal,Rakesh Ranjan Agarwal,Suyash Agarwal**

**Counsel for Respondent :- Praveen Kumar,S.S.C.  
I.T.**

**Hon'ble Bharati Sapru,J.**

**Hon'ble Piyush Agrawal,J.**

**Delivered by Hon'ble Piyush Agrawal, J.**

Hear Sri Suyash Agarwal, learned counsel for the appellant and Sri Praveen Kumar, learned counsel for the respondents.

Present appeal has been filed against the order dated 14.12.2011 passed by Income Tax Appellate Tribunal, Lucknow Bench "A" Lucknow in ITA No. 295/LKW/2011 for assessment year 2008-09 in which following substantial questions of law have been framed:-

*"I. Whether the ITAT was right in holding that the Appellant was not entitled to claim deduction of Rs. 45,50,025 under Section 35(1)(iv) of the Act?*

*II. Whether the VAT Return of March 2008 and certificates dated 05.06.2010 and 13.08.2010 issued by the statutory Vat Authorities are Public Documents under Section 74 of Evidence Act, certifying the first date of production of food division on 25.03.2008, the ITAT rightly held as not valid piece of evidence to allow deduction amounting to Rs. 40,50,025/- u/s 35(1)(iv) of IT Act?*

*III. Whether the Assessment order for A.Y. 2007-08 (01.01.2008 to 31.03.2008) dated 31.01.2011 and rectification order dated 29.07.2011 passed by the Deputy Commissioner Commercial*

*Tax Sector -3, Shahajahanpur confirming the commencement of production of Food Division as well as assessing the purchases/sales of Food Division, the ITAT was right in denying the deduction u/s 35(1)(iv) of IT Act?*

*IV. Whether the ITAT rightly allowed the Commissioner's Appeal on the issue which was not the subject matter of Appeal?*

*V. Whether the ITAT was right in setting aside the depreciation of Rs. 29,29,610/- on account of machinery and Rs. 5,63,110/- on building of Food Division granted by the CIT Appeal?"*

Brief facts of the case, which arise in the present appeal are that the assessee engaged in the manufacture of Implantable Surgical Devices and Disposable Drops and Dressup. During the year the appellant has alleged to have started new business of Food Division for manufacture of Ready to Cook Food and were producing following items:-

1. Punjabi Chhole
2. Dall Tadka
3. Kashmiri Rajma
4. Dall Makhani
5. Shahi paneer
6. Kadi Pakorra
7. Paneer Chunk Soya sauce

It alleged to made first sale of Food Division on 25.3.2008. The appellant in the disputed year has claimed the deductions of Rs. 45,50,025/- under Section 35(1)(iv) of the Income Tax Act, Rs. 29,29,610/- on machinery and Rs. 5,63,110/- on building of Food Division.

The Assessing Authority while framing the assessment order have noticed Form No. 3CD which gives statement of particulars required to be furnished

under Section 44AB of Income Tax Act in which against column No. 8 the appellant has furnished information that it was engaged in manufacture of Implantable Surgical Devices and Disposable Drops and Dressup and there was no change in the nature of business or profession.

Further, it was also noticed by the Assessing Authority from profit and loss account of the assessee and the details of raw-materials consumed, nowhere appellant has made any reference with regard to production and profit from the Food Division.

Further, from Auditor's Report, it also does not reveal any change in business activities as compared to the activities in the immediately preceding year.

The appellant was called to reply as to why the deduction claimed under Section 35(1)(iv) as well as the deduction in machinery and Food Division was carried on during the year under consideration may not be rejected .

In response to the notice, the appellant submitted that the preserved Ready to Cook Food Production was started from 25th March, 2008. A certificate issued by Commercial Tax Department certifying the date of starting production i.e. 25.3.2008 as well as cash purchase vouchers of M/s Sahai Traders from whom the appellant has purchased Dal, Haldi, Mirch, Dhania, Chola, etc., were also submitted .

Further a computerized generated sales voucher amounting to Rs. 13,000/- being sales of certain items to M/s Raju General Stores were also submitted.

On the aforesaid information received from the appellant, the Assessing Officer made necessary inquiry from the above two parties. In absence of

confirmation from the above parties with regard to purchase or sale and also in the light of surrounding circumstances, while passing the assessment order dated 13.12.2010 has held that the business of Food Division has not commenced during the year under consideration.

Accordingly, the Assessing Officer, disallowed the deduction of Rs. 45,50,025/- as claimed by the appellant under Section 35(1)(iv) of Income Tax Act as well as deduction of Rs. 29,29,610 /- on machinery and Rs. 5,63,110/- on building of Food Division.

Against the aforesaid order, the appellant preferred an appeal before the Commissioner of Income Tax (Appeals) Bareilly who, vide its order dated 4.3.2011, allowed the appeal of the assessee and allowed the deduction as claimed.

Against the order of CIT (Appeals), the Revenue filed an appeal before the Tribunal. The Tribunal by the impugned order has allowed the appeal of the Revenue and restored the order of the Assessing Authority. Against the impugned order the present appeal has been filed.

We have perused the record of the appeal which shows that the appellant in support of its claim has not only produced relevant purchase and sale vouchers/bills but has also submitted a survey report and certificate issued by the Commercial Tax Department. On 14.1.2008, the survey was conducted at the business premises of the appellant and it was noticed that the plant and machinery were established. In the said survey a statement was made that the production was likely to be started in the month of March or April, 2008.

Further the appellant has also filed its annual return as prescribed under the U.P. VAT Act, 1998 and in pursuance of the said return so submitted, an assessment order under Section 28(2) of the U.P. VAT Act was also framed.

While passing the assessment order under the U.P. VAT Act the Assessing Authority has observed that on the sale of cooking food the rate of tax is 12% but appellant has accepted tax and deposit the same only at the rate of 4%.

A bare perusal for the record, more precisely the assessment order and survey report dated 14.1.2008 filed by the assessee shows that the production was started in March, 2008 and the sale was also made.

Tribunal, being a last court of fact, was not justified in brushing aside the certificate, survey report and the assessment order passed by one Government Department, i.e., Commercial Tax Department of U.P.

In view of the aforesaid facts, the view taken by the Tribunal in brushing aside the assessment order relevant for the year under consideration is not correct.

The impugned order of the Tribunal dated 14.12.2011, is set aside and matter is remanded back to the Tribunal for reconsideration in accordance with law.

The question of law is answered accordingly in favour of assessee-appellant and against the Revenue.

**Order Date :- 13.2.2019**

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