

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATE : 27.01.2015

CORAM

THE HONOURABLE MR. JUSTICE R.SUDHAKAR
AND
THE HONOURABLE MR. JUSTICE R.KARUPPIAH

T.C.A. NO. 732 OF 2014

The Commissioner of Income Tax
Chennai. ... Appellant

- Vs -

M/s.Palanquin Investments P Ltd.
New No.12 (Old No.71)
3rd Main Road, Kasturba Nagar
Adyar, Chennai 600 020. ... Respondent

Appeal filed under Section 260 A of the Income Tax Act against the order dated 13.8.10 passed by the Income Tax Appellate Tribunal, 'C' Bench, Chennai, made in ITA No.1660/Mds/2009 against the order of the commissioner of Income Tax (Appeals)-V, Chennai, dated 16/3/09 made in ITA. No. 015/2008-09 against the Deputy Commissioner of Income-Tax; Company Circle V(1), Chennai, dated 18/10/06 made in Pan/GIR No. AAACP 4289P for the Assessment year 2004-05.

For Appellant : Mr. T.R.Senthil Kumar

JUDGMENT

(DELIVERED BY R.SUDHAKAR, J.)

Aggrieved by the order dated 13.8.10, passed by the Income Tax Appellate Tribunal in dismissing the appeal filed by it, the Revenue is before this Court by filing the present appeal. The appellant/Revenue has raised the following questions of law for consideration :-

"i) Whether on the facts and in the circumstances of the case, the Tribunal was right in upholding the decision of the CIT (A) who had quashed the order of the assessing officer passed under Section 154 of the Income Tax Act?

ii) Whether on the facts and in the circumstances of the case, the Tribunal was right in not considering Section 94 (8) while dealing with the issue on hand?"

2. Shorn of unnecessary details, the brief facts of the case are that the respondent/assessee filed return of income for the assessment year 2004-2005 declaring a total income of Rs.9,10,880/=. The assessee is carrying on business of investment and trading in shares. The return of income comprised of long term capital gains to the tune of Rs.3,67,213/= and short term capital gains to the tune of Rs.6,27,049/= and income from other sources at Rs.1,017/=. The short term capital gain was arrived at after setting off short term capital loss of Rs.34,30,444/=. The assessment under Section 143 (3) of the Income Tax Act was completed on 18.10.06.

3. On 3.3.08, notice under Section 154 of the Income Tax Act was issued to the respondent/assessee stating that the claim of short term capital loss was not admissible, as the assessee had, on 22.2.04 purchased 462474.292 units of Chola Freedom Fund at a price of Rs.85 Lakhs. On 26.2.04, the assessee received bonus units of 3,69,979.434. On 2.3.04, 4,20,603.713 units were redeemed for a sum of Rs.43 Lakhs and the proportionate cost of the redeemed units was worked out by the assessee at Rs.77,30,444/=. After setting off the consideration of Rs.43 Lakhs received on redemption, the net loss was arrived at Rs.34,30,444/=. which amount was claimed as short term capital loss by the assessee. The Assessing Officer was of the opinion that the redeemed units could be the original units or bonus units. It is the further stand of the Assessing Officer that even after redemption, 4,11,859.999 units were available with the assessee. Therefore, the assessing officer held that the short term capital loss, claimed by the assessee, was notional and not actual.

4. The Assessing Officer, by relying on Sections 94 (1), 94 (4) and 94 (7) of the Income Tax Act came to conclusion that there is a mistake apparent on the record appearing in the assessment. However, the assessee clarified that the short term capital loss was correctly worked out under Section 94 (8) of the Act, which is applicable to bonus units and cannot be made applicable to the impugned assessment year, but only for the next assessment year. However, the Assessing Officer did not accept the said contention of the assessee and denied the claim of short term capital loss.

5. Aggrieved against the said assessment, the respondent/assessee preferred appeal before the CIT (Appeals), inter alia contending that Section 94 (8) came into operation only from the assessment year 2005-2006 and, therefore, it cannot be referred to for making any disallowance for the assessment year 2004-2005. The CIT (Appeals) agreed with the contention of the assessee and held that the

rectification made by the assessing officer was not in order and, therefore, set aside the same.

6. On an appeal by the Department against the said order of the CIT (Appeals), the Tribunal was of the view that the rectification order dated 16.5.08 under Section 154 of the Act (which is wrongly stated as 16.05.06 in the order of the Tribunal), shows that the Assessing Officer himself was not sure whether the redeemed units are original units or bonus units. The Tribunal further held that the Assessing Officer had presumed that Section 94 (8), which came into the statute through Finance (No.2) Act, 2004, with effect from 1.4.2005 was retrospective. However, such a view came to be clarified only after the Tribunal decided the issue in M/s. Marine Container Services (South) Pvt. Ltd. (ITA No. 384/Mds/2008 dated 18.7.08). The Tribunal was of the view that since the Assessing Officer himself was not sure whether the units sold by the assessee were original or bonus units in case of doubt or ambiguity, it was held by the Tribunal that the question of rectification does not arise. The Tribunal further held that the order under Section 154 of the Act could not be invoked when the issue is debatable and rectification of mistake could be done only when the error or mistake is apparent on record. Aggrieved against the said order of the Tribunal, the Revenue is before this Court raising the above questions of law.

7. Heard Mr. T.R. Senthil Kumar, learned standing counsel appearing for the Revenue and perused the materials available in the typed set of documents.

8. On a careful perusal of the materials available on record and the findings as given by the CIT (Appeals) as also the Tribunal for arriving at the decision, this Court is in agreement with the findings of the Tribunal that when the Assessing Officer is in doubt as to the nature of the units sold and the fact that Section 94 (8) of the Act being clarified by the Tribunal to have retrospective operation only by the subsequent decision of the Tribunal, there is no scope for the Assessing Officer to resort to Section 154 proceedings after having accepted the assessee's stand and completed the assessment under Section 143 of the Act on 18.10.06. Therefore, this Court is of the considered view that the proceedings under Section 154 of the Income Tax Act is not justified in the facts and circumstances of the present case. In view of the above, this Court holds that the CIT (Appeals) was justified in setting aside the order of the Assessing Officer, which was subsequently confirmed by the Tribunal.

9. The 2nd issue raised by way of the other question of law becomes academic in view of the above order of this Court. However, it is open to the Department to raise such a plea in appropriate case.

10. In view of the findings as recorded above, this Court is of the considered view that there is no questions of law, much less substantial questions of law that arises for consideration in this appeal. Accordingly, this appeal fails and the same is dismissed.

Sd/-
Asst. Registrar

/true copy/

Sub Asst. Registrar.

To

1. The Commissioner of Income Tax
Chennai.
2. The Assistant Registrar,
The Income Tax Appellate Tribunal
'C' Bench, Chennai.
3. The Commissioner of Income Tax(Appeals) V,
Chennai.
4. The Deputy Commissioner of Income Tax, Company circle V(1),
Chennai.

+1cc to Mr.T.R.Senthil Kumar, Advocate, S.R.No.3908/15

T.C.A. NO. 732 OF 2014

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