IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 05.10.2015

CORAM

THE HONBLE MR.JUSTICE V.RAMASUBRAMANIAN
and
THE HON'BLE MR.JUSTICE K.RAVICHANDRABAABU

Tax Case Appeal No.991 of 2010

Terra Energy Ltd.
Eldorado V Floor
112, Uthamar Gandhi Salai
Nungambakkam
Chennai 600 034. .. Appellant

Vs.

The Deputy Commissioner of Income Tax
Company Circle III(2)
Ayakar Bhavan
Chennai 600 034. ..Respondent

Appeal under Section 260A of the Income Tax Act, 1961, against the order of the Income Tax Appellate Tribunal "C" Bench, Chennai, dated 23.4.2010 made in ITA No.1014/Mds/2009 for the assessment year 2004-05.

and against the Order of the Commissioner of Income -Tax (Appeals)-III, Chennai-34. made in ITA.NO.102/07-08/A-III Dated 27.02.2009 for the Assessment Year 2004-2005 and against the Order of the Assessment passed by the Asst.Commissioner of Income-Tax, Company Circle-III (2) Chennai-34 made in GIR No./PAN No.AABCT2824R, Dated 31.10.14 for the Assessment Year 2004-2005.

For Appellant : Mr.R.Sankaranarayan

For Respondent : Mr.T.Ravi Kumar

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J U D G M E N T

(Delivered by V.Ramasubramanian,J.)

This tax case appeal was admitted on 15.11.2010, on the following questions of law:

> (1) Whether the Income Tax Appellate Tribunal is right in holding that the error that crept in on account of using the same template used in the prior occasion would not amount to a mistake?
>
> (2) Whether or not the error in reporting a profit figure as a loss figure had resulted in loss of revenue to the exchequer in the light of the fact that such error had only resulted in increase in carried forward losses without impacting the tax liability, which had in any way been determined on the basis of minimum alternate tax provisions and duly discharged and the carried forward losses had been corrected by the rectification carried out in the return of the subsequent assessment year? and
>
> (3) Whether or not the decision of the Income Tax Appellate Tribunal in changing findings of fact by the Commissioner of Income Tax (Appeals) without any further material or available material is lawful?"

2. Heard Mr.R.Sankaranarayan, learned counsel for the appellant and Mr.T.Ravi Kumar, learned Standing Counsel for the Department.

3. The appellant filed Form No.1 under Rule 12(1)(a) of the Income Tax Rules, 1962, along with necessary schedules, on 30.10.2004 in respect of the assessment year 2004-05. In column No.18 of the said Form, the appellant/assessee showed a gross total income of Rs.8,62,60,370/- (but signifying that the assessee had suffered a net loss to that extent for the said assessment year).

4. As a matter of fact, the memo of income that accompanied Form No.1 under Rule 12(1)(a) of the Rules showed the following particulars:

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MEMO OF INCOME ADJUSTED FOR INCOME TAX PURPOSES			
		Rs.	Rs.
PROFIT as per Profit and Loss Account			113,529,755
Add: Depreciation as per books			80,433,740
	PROFIT		193,963,495
Less: Depreciation for Income tax purposes			108,796,889
	LOSS		
Less:	Disallowances under Section 43B		
	Bonus provided but not paid	27,188	
	Gratuity Provision	427,183	
	Superannuation provision	52,685	
	Profit on sale of assets considered separately	1,660,874	
	Leave wages provision not paid	25,649	
	Loan Processing Fees claimed as deduction in earlier assessment years, and charged to profit and loss account	115,275	2,308,854
			(87,475,460)
Add:	Voluntary Compensation paid during the year ended 31.3.2001 allowable under Section 35DDA - 1/5th of 3,90,414/- III Year	78,083	

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MEMO OF INCOME ADJUSTED FOR INCOME TAX PURPOSES			
	Share Issue Expenses allowable under Section 35D - 1/5th of Rs.10,20,000/- III Year	204,000	
	Bonus Provision disallowed in previous Asst. year paid during the year (Sec.43B)	57,842	
	Interest on loans borrowed for A.Chittur, capitalised in books claimed as revenue	559,547	
	Expenditure incurred at Kollumangudi capitalised in capital work in progress in accounts claimed as revenue expenditure	275,618	1,215,989
	LOSS		(86,260,370)

5. Before we proceed further, it could be seen even from a cursory glance at the particulars furnished in the Memo of Income which we have extracted above that the appellant/assessee had in fact earned a profit of Rs.8,62,60,370/-, but by a mistaken process, instead of deducting the fourth entry from the third entry, they had deducted the third entry from the fourth entry.

6. The case of the assessee was chosen for scrutiny and a notice was issued on 25.8.2005. At that time, the appellant/assessee claims to have noticed that what was actually a profit was wrongly indicated in column No.18 of Form No.1 and in the Memo of Income filed on 31.10.2004 as a loss. Therefore, when Form No.1 for the assessment year 2005-06 was filed on 31.10.2005, along with a Memo of Income, the appellant/assessee did not show the said amount of Rs.8,62,60,370/- as a business loss to be carried forward. In other words, the mistake that the assessee committed got rectified in the Memo of Income and Form No.1 filed on 31.10.2005 in relation to the assessment year 2005-06.

7. However, the Assessing Officer initiated penalty proceedings under Section 271(1)(c), by issuing a show cause notice dated 17.5.2007. To the show cause notice, the appellant sent a reply dated 11.6.2007. In the reply, the appellant/assessee pointed out that the Memo of Income was

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prepared in an Excel Sheet, the format of which had already been fed into the computer and that in the previous years, the depreciation for income tax purposes which appears as the fourth entry far exceeded the profit that appeared as the third entry and that as a consequence, the command given to the software for the preparation of excel sheet was for deducting (c) from (d). Since this command was not altered in respect of the assessment year 2004-05, the system deducted the entry No.3(c) from entry No.4(d) and showed what was actually a profit, as a loss.

8. However, the explanation offered by the assessee was overruled by the Assessing Officer and by an order dated 28.6.2007, the Assessing Officer imposed a penalty of Rs.4.00 Crores on the ground that the total evasion of tax worked out to Rs.2,25,29,973/- and that a maximum penalty of Rs.6,75,89,919/- could have also been levied.

9. As against the said order of penalty, the appellant filed the first appeal before the Commissioner of Income Tax (Appeals). The Commissioner (Appeals) allowed the appeal of the appellant/assessee by an order dated 27.02.2007, posing three important questions for arriving at the conclusion. The questions that the Commissioner (Appeals) posed to himself were (i) whether it was a case of concealment irrespective of its origin, (ii) whether it was a rectifiable mistake which did not attract any penalty, and (iii) whether the mistake was found out by the Assessing Officer or admitted by the assessee himself. The Commissioner (Appeals) found the answers to these three questions in favour of the appellant/assessee and consequently, he set aside the order of penalty passed by the Assessing Officer.

10. The Department filed a second appeal before the Income Tax Appellate Tribunal. The Appellate Tribunal held that the case on hand would fall under the category of furnishing of inaccurate particulars of income and consequently, held Explanation 1 to Section 271(1)(c) being attracted in the case. The reliance placed by the appellant on the decision of this Court in CIT v. Lakshmi Vilas Bank [303 ITR 428] and the decision of the Supreme Court in Udayan Mukherjee v. CIT [(2007) 291 ITR 318] were distinguished by the Tribunal and the Tribunal eventually allowed the appeal of the Department and confirmed the order of penalty imposed by the Assessing Officer. Aggrieved by the said order, the assessee is on appeal before us.

11. Mr.R.Sankaranarayanan, learned counsel for the appellant contended that though in the original order passed by the Assessing Officer, he came to the conclusion that the total evasion of tax worked out to Rs.2,25,29,973/-, after the original proceedings relating to the assessment terminated on an appeal and an order giving effect to the order passed on appeal,

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it was ultimately found that the appellant/assessee was entitled to a refund of Rs.5,14,49,683/-. Therefore, it is his contention that the first impression that the Assessing Officer had as though there was a tax evasion to the tune of Rs.2,25,29,973/- got rectified eventually.

12. In the light of the above fact, the learned counsel contended that this is not a case which would fall either under the category of concealment of income or under the category of furnishing of inaccurate particulars. What was actually a clerical or arithmetical mistake in projecting the same figure as a loss, instead of profit, on account of a wrong command given to the system, cannot be construed, according to the learned counsel, as furnishing of incorrect particulars. The learned counsel relies upon the decision of the Delhi High Court in CIT v. Nalwa Sons Investments Ltd. [(2010) 327 ITR 543], which was confirmed by the Supreme Court in SLP.(Civil) No.18564/2011 by a judgment dated 04.5.2012.

13. In response to the above contentions, it is contended by Mr.T.Ravi Kumar, learned Standing Counsel for the Department that Form No.1, which an assessee is obliged to file under Rule 12(1)(a) of the Income Tax Rules, 1962, is not prepared in an excel sheet and is not taken as a print out of the computer. The particulars recorded therein are actually handwritten. Column No.18 in Form No.1 has been filled up by hand by the assessee with the deliberate intention of misleading the Department as though there was a business loss to the extent of Rs.8,62,60,370/-. Therefore, the learned Standing Counsel contended that the mistake, which was deliberately done by hand, cannot be shifted to the mechanical failure. In addition, he also contended that Form No.1 contains a column at the bottom where the signatory to the Form is obliged to make a verification and declare that all the particulars furnished therein are correct and complete and that the particulars are truly stated therein. There is also a foot-note to Form No.1 which declares that a person making a false statement in Form No.1 is liable to be prosecuted under Section 277 of the Income Tax Act, 1961. Therefore, the learned Standing Counsel contended that the person who filled up the Form in such a manner that would automatically indicate a false declaration and false verification and a person who has made himself liable for criminal prosecution, but has escaped merely with a penalty, can have no grievance as against the order of the Tribunal.

14. In support of his contention that cases of this nature would also attract penalty under Section 271(1)(c), the learned Standing Counsel for the Department relied upon a series of decision, which are as follows:

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(1) Joint Commissioner of Income Tax v. Saheli Leasing & Industries Ltd. [(2010) 324 ITR 170 (SC)];

(2) Commissioner of Income Tax v. Zoom Communication (P) Ltd. [(2010) 327 ITR 510 (Delhi)];

(3) Commissioner of Income Tax v. Harparshad and Company Ltd. [(2010) 328 ITR 53 (Delhi)];

(4) Mak Data P. Ltd. v. Commissioner of Income Tax [(2013) 358 ITR 593 (SC)];

(5) Commissioner of Income Tax v. Morgan Finvest (P) Ltd. [(2013) 30 taxmann.com 6 (Delhi)];

(6) Commissioner of Income Tax v. M.Thiruvengadam [(2013) 36 taxmann.com 321 (Madras)];

(7) Sri Gokulam Hotels India (P) Ltd. v. Assistant Commissioner of Income Tax [(2014) 49 taxmann.com 543 (Madras)];

(8) M/s. Lanxess India Pvt. Ltd. v. Assistant Commissioner of Income Tax [unreported decision of this Court dated 02.12.2014 in TCA No.928 of 2014]; and

(9) Kuldeep Wines v. Commissioner of Income Tax [(2014) 49 taxmann.com 253 (AP)].

15. We have carefully considered the rival submissions.

16. Before we get into the details, it would be useful to look at the scope of the power conferred under Section 271(1)(c), the authorities on whom such powers are conferred and the scope of an appeal before the Income Tax Appellate Tribunal. It is no doubt true that an appeal to the Income Tax Appellate Tribunal is filed under Section 253(1). While an appeal to this Court under Section 260-A can only be on a substantial questions of law, there is no such restriction with regard to the appeals to be filed before the Tribunal under Section 253(1). Therefore, the appeal to the Tribunal could be on a factual aspect as well as a legal aspect. Keeping this in mind, let us now turn our attention to the authorities on whom a power to impose penalty is conferred under Section 271(1)(c) and the circumstances under which the penalty could be imposed.

17. Since the extraction of the provision of Section 271 will consumer more papers, we restrict what is to be extracted in respect of Section 271(1) only to the preliminary portion. The first part of Sub-section (1) of Section 271 reads as follows:

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"If the Assessing Officer or the Commissioner (Appeals) or the Principal Commissioner or the Commissioner in the course of any proceedings under this Act, is satisfied that any person- ".

18. From the above, it is clear that the power to impose a penalty is vested only with the Assessing Officer, the Commissioner (Appeals) or the Principal Commissioner or the Commissioner in the course of any proceedings. In other words, the Tribunal is not empowered to impose a penalty.

19. As a consequence of the authorities on whom the power to impose penalty is conferred, the circumstances under which penalty can be imposed is also circumscribed by the expression "is satisfied". Therefore, what Section 271(1) requires is a satisfaction on the part of the Assessing Officer or the Commissioner. In a case where the Assessing Officer or the Commissioner has arrived at such a satisfaction in an objective manner, we do not know whether the Tribunal, on account of being empowered to deal with questions of fact and law, will be entitled to interfere with an objective satisfaction arrived at by the Assessing Officer or the Commissioner (Appeals). Anyway, we will not go into this question for the present.

20. This is a case where, as pointed out by the learned counsel for the appellant, at the time when the Assessing Officer passed the order imposing the penalty, he was of the view that the mistake committed by the appellant resulted in total evasion to the tune of Rs.2,25,29,973/-. Unless the furnishing of wrong particulars or the concealment of particulars had actually resulted in an evasion of tax or an under payment of tax, a penalty itself cannot be levied. The reason is that Section 271(1)(c), as admitted by the Assessing Officer himself, stipulates a minimum as well as a maximum penalty. If the tax evasion is zero, even the minimum penalty as well as the maximum penalty can only be zero. It requires nothing more than mere arithmetics to show that the multiplication of zero by any number will result only in zero. Therefore, the first pre-requisite for the imposition of penalty is that a difference in payment of tax has actually arisen out of the entire exercise. If the difference in the amount of tax payable, in the course of any proceeding is nil or actually on the negative, we do not know how a minimum of not less than and not more than three times such penalty can be levied. This is a more fundamental fact that the Tribunal has completely omitted to take note of. On the contrary, the Commissioner (Appeals) has taken note of this fact.

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21. It is in the light of the above fact that the tax liability that arose out of the entire exercise was nil that the decision of the Division Bench of the Delhi High Court in Nowal Sons Investments Ltd. relied upon by the learned counsel for the appellant assumes significance. In Nowal Sons Investments Ltd., the Division Bench of the Delhi High Court was dealing with a case where the total income of the assessee was first computed under the normal provisions of the tax and the tax payable on such total income was compared with the prescribed percentage of the book profits computed under Section 115-JB of the Act. Ultimately, on the basis of disallowance and additions made and relying upon the decision of Commissioner of Income Tax v. Gold Coin Health Food Pvt. Ltd. [(2008) 304 ITR 308 (SC)], a penalty was imposed. But, while setting aside the penalty, the Division Bench of the Delhi High Court held that even in a case where the assessee was guilty of furnishing of wrong particulars, it should have had an effect upon an amount of tax sought to be evaded. The relevant portion of the decision of the Division Bench reads as follows:

> "The question, however, in the present case, would be as to whether furnishing of such wrong particulars had any effect on the amount of tax sought to be evaded. Under the Scheme of the Act, the total income of the assessee is first computed under the normal provisions of the Act and tax payable on such total income is compared with the prescribed percentage of book profits computed under Section 115JB of the Act."

This decision of the Delhi High Court was affirmed by the Supreme Court by the dismissal of the SLP.

22. Coming to the decisions relied upon by the learned Standing Counsel for the Department, it can be seen that there was an underlying factor in all those cases. In all those cases, two things emanate from the facts. The first is that the tax that was found to be payable ultimately was different and actually higher than the tax actually paid by the assessee. The second is that what was found out was in respect of certain concealments or wrongful claims which the assesee was not entitled to make, but they made and also claimed a lesser levy of taxes.

23. In Saheli Leasing & Industries Ltd., the Supreme Court was concerned with a case where the assessee filed a return showing loss and the income was also assessed as nil income. The assessee was able to do it, on the basis of a claim for depreciation to the tune of Rs.24,22,531/-. The assessee was actually a leasing company, which was not entitled to claim

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depreciation on plant and machinery as per the law. Therefore, the Supreme Court held that the same was a case of concealment of particulars of income and also a case of wrongful claim which the assessee was not entitled to make.

24. In Zoom Communication (P) Ltd., the Division Bench of the Delhi High Court was concerned with the case of an assessee who was engaged in the business of hiring of audio and video equipments. The assessee debited a particular amount under the head "equipment written off". Later, he claimed that due to oversight, this amount was not added back in computation of income. Therefore, the Delhi High Court held that such a person cannot escape the consequences of a benefit that would have actually accrued to the assessee on account of the oversight or mistake by whatever name it was called.

25. In Mak Data P. Ltd., the Supreme Court was concerned with the case of an assessee, whose account was taken up for scrutiny in the course of which certain documents comprising of share application forms, bank statements, affidavits, copies of income, blank share transfer forms duly signed were found and impounded. Actually, these documents were found in the course of survey proceedings under Section 133A, in the course of a search conducted in the sister concern of the assessee. Therefore, the penalty proceedings were found to be justified in that case.

26. Morgan Finvest (P) Ltd. decided by the Delhi High Court was also a case of wrongful claim for depreciation in respect of a property that was not used for business purposes. Similarly, M.Thiruvengadam decided by this Court was a case where a finding of fact was recorded by this Court that the assessee made an attempt to fabricate evidences to make illegal gain by suppression of profits. Therefore, the same cannot be equated to the case on hand.

27. In Sri Gokulam Hotels India (P) Ltd., the liability arose out of the difference in interpretation of Section 115-JB. This difference had an impact on the taxes. Therefore, the said decision cannot also go to the rescue of the department.

28. In Lanxess India Pvt. Ltd. (unreported decision) decided by this Court, a wrongful claim relating to royalty payment was made. Therefore, this Court applied the principles laid down by the Supreme Court in Gold Coin Health Food Pvt. Ltd.

29. In Kuldeep Wines, the Andhra Pradesh High Court was concerned with a case where there was a concealment with respect to the collection of refundable empty bottles. The actual finding was recorded in that case to the effect that this concealment would never have come to light but for the search

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operations conducted by the revenue. Therefore, the said case cannot also go to the rescue of the revenue.

30. Having said it, let us now turn our attention to the manner in which the Commissioner of Appeals, who is competent under Section 271(1) by himself to impose penalty, dealt with the case on hand. In paragraph 15.8 of the order dated 27.02.2009, the Commissioner (Appeals) indicated that he had perused the assessment records, the questionnaire dated 31.7.2006 as well as the order sheet dated 23.10.2006. The Assessing Officer appears to have sent a letter dated 26.3.2008 to the Commissioner (Appeals) pointing out that the notice under Section 143(2) dated 25.8.2005 was issued much before the appellant filed a return for the assessment year 2005-06. Therefore, the Assessing Officer pointed out to the first Appellate Authority that the assessee must have seen the scrutiny notice and thereafter filed the return of income. But, this argument was rejected by the Commissioner (Appeals) on the ground that the penalty proceedings cannot be levied on the basis of questionnaire or office note and that it cannot be based upon presumptions and conjectures. After having said that the Commissioner (Appeals) took up in paragraph 15.9 for consideration the question whether there was a mistake in computation sheet warranting the levy of penalty. The Appellate Commissioner relied upon the decision of the Supreme Court in Udayan Mukherjee.

31. In Udayan Mukherjee, the Calcutta High Court was concerned with a case whether there was a mistake due to indexation. Finding that all the particulars had already been disclosed and that on the basis of such particulars, the exact amount to be taxed could be easily arrived at, the Calcutta High Court held that a mistake that happened due to wrong indexation, cannot fall under the category of furnishing a wrong particulars or concealment of particulars. In the penultimate paragraph of its decision, the Calcutta High Court indicated that there is a distinction between furnishing of wrong particulars and making a wrong calculation on the basis of the particulars furnished. If the particulars are furnished, then there cannot be any question of concealment.

32. Since the decision of the Calcutta High Court in Udayan Mukherjee arose under almost identical circumstances, we are of the considered view that the reliance placed upon the same by the Calcutta High Court was justified. Even in the case on hand, the profit that the appellant/ assessee had earned, did not undergo any change in terms of the numerals. The actual profit that the appellant had earned for the assessment year 2004-05 was Rs.8,62,60,370/-. It is the very same amount that has been shown to be a loss, by showing the same within brackets. However, the mistake that had happened has also been explained

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properly by the assessee. Therefore, we are of the considered view that this is a case which did not actually result in the amount of tax payable by the appellant becoming completely different from what they have paid. As we have indicated earlier, the penalty to be levied is indicated in Sub-clause (iii) to be the same which shall not be less than, but which shall not exceed three times the amount of tax sought to be evaded by reason of concealment of particulars or the furnishing of incorrect particulars. If this amount is zero, the minimum or maximum penalty cannot be less or more than the very same amount. Therefore, we are of the considered view that the discretion or the power to arrive at a satisfaction conferred upon the Commissioner of Income Tax under Section 271(1) ought not to have been interfered with by the Tribunal. Since the Tribunal has done that, the order of the Tribunal requires to be upset. Therefore, the questions of law are answered in favour of the appellant and the appeal is allowed. No costs. Consequently, M.P.No.1 of 2010 is closed.

kpl

Sd/-
Asst.Registrar

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Sub Asst. Registrar

To

1. The Registrar, Income Tax Appellate Tribunal,
   'C' Bench, Chennai.

2. The Commissioner of Income Tax (Appeals)-III,
   121, Mahatma Gandhi Road, Chennai-34.

3. The Deputy Commissioner of Income Tax
   Company Circle III(2)
   Ayakar Bhavan,
   Chennai 600 034.

+ 1 cc to Mr.R.Sankaranarayan, Advocate Sr 53984

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