IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated: 08.03.2016

Coram:

The Hon'ble Mr.Justice V.RAMASUBRAMANIAN
and
The Hon'ble Mr.Justice N.KIRUBAKARAN

Tax Case Appeal Nos.167 to 174 of 2012 and M.P.Nos. 1 of 2015 (8 cases)

D.Srinivas Vyas ..Appellant/Respondent in T.C.As.167 & 168/2012

Versus

Income Tax Officer,
Ward-IX(1),
4th Floor Kannammai Building
611, Anna Salai,
Chennai - 600 006. .. Respondent/Appellant in T.C.As.167 & 168/2012

Durga Das Vyas ... Appellant in T.C.As.169 to 174/2012

Vs.

Income Tax Officer
Ward-IX(3)
4th Floor Kannammai Building
611, Anna Salai,
Chennai - 600 006. ... Respondent in T.C.As.169 to 174/2012

Tax Case Appeals filed under Section 260-A of the Income Tax Act, 1961. T.C.A.Nos. 167 and 168 of 2012 against the Order of the Income tax Appellate Tribunal Bench 'A', Chennai, dated 14.11.2011 in ITA Nos.1140 and 1141/Mds/2009 and against the orders made in ITA Nos.126 and 125/08-09 of the Commissioner of Income Tax (Appeals)-IX, 121, Mahatma Gandhi Road, Chennai 34, dated 31.03.2009 and against the orders made in PAN/GIR No.ABVPV 4706G, of the Income Tax Officer Ward IX(1), Chennai, dated 30.12.2008 for the Assessment years 2001-02 and 2002-2003 and T.C.A.Nos. 169 to 174 of 2012 against the Order dated 14.11.2011 in ITA Nos.1311, 1312, 1313, 1314, 1315, 1316/Mds/2009 and against the orders made in ITA Nos.08 to 13/09-10, of the Commissioner of Income Tax (Appeals)IX, 121, Mahatma Gandhi Road, Chennai 34, dated 29.05.2009 and against the orders made in PAN/GIR No.ADAPV 2591C, of the Income Tax Officer Ward IX(3), Chennai, dated 06.03.2006 and 31.03.2004 for the Assessment Years, 1998-1999, 1999-2000, 2000-2001, 2002-2003, 2003-2004 and 2001-2002 respectively.

For Appellant : Mr.K.Subramaniam

For Respondent: Mr.M.Swaminathan, Standing Counsel

JUDGMENT

(Judgment of the Court was made by V.Ramasubramanian, J

While the first two appeals T.C.A.Nos. 167 and 168 of 2012 are filed by the son, the other appeals are by the father. All these appeals are filed under Section 260-A of the Income Tax Act, challenging orders passed by the Income Tax Appellate Tribunal Bench 'A' Chennai.

2. On 18.6.2012, all the appeals were admitted by this Court, but separate questions of law were framed in the first two cases and in the next six cases.

3. The substantial questions of law framed in T.C.A.Nos. 167 and 168 of 2012 are as follows:-

> "1. Whether on the facts and in the circumstances of the case, the Income Tax Appellate Tribunal was right in holding that the alleged commission receipts from M/s. Siemens Ltd. were assessable in the hands of the appellant on a substantive basis even though on the basis of an application filed by M/s. Siemens Ltd. before the Settlement Commission admitting the unsubstantiated commission payments as its own income and the Settlement Commission had accepted such disclosure by M/s. Siemens Ltd. and the income of the said company for the assessment years 2001-02 and 2002-03 had been recomputed on that basis?
>
> 2. Whether on the facts and in the circumstances of the case, the Income Tax Appellate Tribunal was right in holding that the alleged commission receipts from M/s. Balaha Chemicals and M/s. Gem Enterprises were assessable in the hands of the appellant even though the said amounts had been assessed in their respective hands and the appeals filed by those concerns had been dismissed?"

4. The substantial questions of law framed in T.C.A.Nos. 169 to 174 of 2012 are as follows:-

> "1. Whether on the facts and in the circumstances of the case, the Income Tax Appellate Tribunal was right in holding that the alleged commission receipts from M/s. Siemens Ltd. were assessable in the hands of the appellant on a substantive basis even though on the basis of an application filed by M/s. Siemens Ltd. before the Settlement Commission admitting the unsubstantiated commission payments as its own income and the Settlement Commission had accepted such disclosure by M/s. Siemens Ltd. and the income of the said company for the assessment years 1998-99 to 2003-04 had been recomputed on that basis?
>
> 2. Whether on the facts and in the circumstances of the case, the Income Tax Appellate Tribunal was right in holding that the issue involved was debatable the Assessing was right in rejecting the appellant's petition under Section 154 for the assessment years 1998-99 to 2003-04 even though the Assessing Officer had not passed any speaking order setting forth the reasons for the rejection?

5. Heard Mr.K.Subramaniam, learned counsel appearing for the appellants/assessees and Mr.M.Swaminathan, learned Standing Counsel for the Department.

6. The assessees in this batch of cases, claimed to be involved in Commission Agency business. The father Mr.Durga Das Vyas, who is the appellant in T.C.A.Nos. 169 to 174 of 2012, filed return of income on 19.10.2001, admitting total income of Rs.1,78,730/-. It was processed under Section 143(1) of the Income Tax Act, 1961 and a notice was issued under Section 143 (2) of the Act.

7. In the course of assessment, the father accepted that he had received commission to the tune of Rs.1,18,56,346/- from M/s. Seimens Limited, Mumbai, a sum of Rs.30,00,000/- from M/s. Shree Balaha Chemical Agencies, Chennai, Rs.7,50,000/- from M/s. Gem Enterprises, Chennai and Rs.1,34,075/- from M/s. Cable Corporation of India, Mumbai. The total commission so received was Rs.1,57,40,421/-.

8. The father-assessee also claimed that he had paid commissions to six different entities to the total tune of Rs.1,40,95,000/-. When notices were issued to all those six

persons, only one responded.

9. When the father-assessee was examined under Section 131 of the Act, he admitted that he had no technical qualification or expertise and that he did not have any infrastructure or agreement to render any services to M/s. Seimens Limited.

10. Therefore, the Assessing Officer passed an order dated 31.3.2004, disallowing the commission of Rs.1,40,95,000/- allegedly paid by the father-assessee to third parties and completed the assessment.

11. Similarly, independent Assessment Orders were passed for the Assessment Years 1998-99, 1999-2000, 2000-01, 2002-03 and 2003-04, on 6.3.2006, disallowing the commission claimed by the father-assessee to have been paid to third parties.

12. Without challenging the Orders of Assessment by way of appeal, the father-assessee filed independent applications under Section 154 for rectification. It is pertinent to note that these applications for rectification were filed after more than two years and 8 months. The only ground on which rectification was sought was that the company from which the father-assessee received commission, went before the Settlement Commission, accepted the payments made to the father-assessee as un-substantiated payments, got them treated as part of their income, paid tax and also got immunity from further action.

13. The petitions filed under Section 154 of the Act were dismissed by a non-speaking one line order dated 30.3.2009 by the Assessing Officer. But by a speaking order, the Commissioner of Income Tax (Appeals) allowed the appeals on 29.05.2009, holding that there was an error apparent which could have been corrected by the Assessing Officer.

14. The Revenue filed Second Appeals before the Income Tax Appellate Tribunal. These appeals were allowed by the Tribunal, by a common order dated 14.11.2011, holding that when the issue raised in Application under Section 154 is a debatable issue, it would not fall under the category of error apparent. Therefore, aggrieved by the order of the Tribunal, the father-assessee is before us.

15. As we have pointed out earlier, this Court had framed two substantial questions of law for consideration in the appeals of the father namely T.C.A.Nos. 169 to 174 of 2012. The first substantial question of law revolves around the effect of

the order of the Settlement Commission in favour of M/s. Siemens Limited.

16. This issue was answered by the Tribunal in paragraph 7 of its order. The Tribunal pointed out that the specific case of Siemens Limited before the Settlement Commission was that in some cases, the monies paid to individuals like the assessees herein, were received back. Therefore, the Tribunal held that there were two different categories of cases and hence the Settlement Commission's Order cannot be taken advantage by the father-assessee.

17. Assailing the order of the Tribunal, it is contended by Mr.K.Subramaniam, learned counsel for the assessee that when the Assessing Officer as well as Commissioner of Income Tax (Appals) did not make any categorisation, the Tribunal could not have made categorisation. Additionally it is contended that even in their grounds of appeal, the Department agreed to the grant of relief to the extent of commission received, but the Tribunal overreached even the Department's case.

18. We have carefully considered both the above submissions.

19. Irrespective of the nitty-gritty, the admitted fact in the case of the father-assessee is that he received payments from M/s Siemens Limited. These payments running to more than Rs.1 Crore was made by M/s. Siemens in the form of cheques. According to Siemens Limited, before the Settlement Commission, they were unable to substantiate the nature of the services rendered by the father-assessee, so as to entitle him to receive such a huge amount. Even according to the father-assessee, he did not have any technical expertise, he did not have any agreement with M/s. Siemens Limited and he could not indicate the nature of the services rendered by him so as to receive such a huge commission. Therefore, it is clear that the father-assessee received a payment which was not due to him. We do not know whether the father-assessee acted as a conduit for some other person.

20. The payments received by the father-assessee in the form of cheques, were also deposited by him into his bank account and immediate withdrawals of cash was observed from the accounts. Therefore, two things would follow. They are (1) either these cash withdrawals were for payment to the persons to whom they were actually intended or (2) they were paid back to M/s. Siemens Limited. These two things that follow as a corollary, will not amount to categorisation of payment. Therefore, we are unable to accept the contention that the

Tribunal made a categorisation not found by two lower authorities.

21. It is true that by an order passed on 7.1.2008, the Settlement Commission, Mumbai not only added these amounts as the income of M/s. Siemens Limited, but also taxed them and granted them immunity from other proceedings. But the same would not tantamount to a protection granted to other persons who are subjected to protective orders of assessment.

22. In a Circular issued by the Central Board of Direct Taxes, bearing No.71, dated 20.12.1971, the Board has indicated that once the same income is assessed as a protective measure in the hands of more than one assessee, the protective assessment needs to be cancelled after the relevant assessments have become final and conclusive. The Circular also indicates that the only method of doing this is by invoking Section 154, irrespective of the time prescription contained in Sub-Section (7) of Section 154.

23. We do not think that the above Circular can be made use of by persons whose transactions prima facie do not appear to be genuine. There may be a genuine transaction where one assessee is unable to substantiate a payment as an expenditure and hence suffers an assessment. His counter part who was the recipient of the money, if he has genuinely received the payment for certain services rendered or goods supplied, cannot be made to suffer once more.

24. But such a benefit cannot be extended to transactions which are made in the nature of accommodation entries, for collateral purposes. In the case of the father-assessee, cash withdrawals had been made immediately after receipt of cheque payments from M/s. Siemens Limited. The father-assessee attempted to show these withdrawals as payments to six different parties. That claim was rejected by the Assessing Officer and that rejection attained finality, as the father-assessee failed to challenge the Assessment Orders.

25. In other words, the cases on hand will not be covered by the Circular for one more reason namely that the assessee do not stop with the mere receipt of money. He withdrew it and claimed to have paid to different third parties, but those payments were disallowed. Therefore, if his submission that he had paid money to third parties is true, the money received by him could be only his income. Therefore, the appellant cannot contend that the order of the Settlement Commission clinches the entire issue.

26. In view of the above, the first substantial question of law in T.C.A.Nos. 169 to 174 of 2012 has to be answered against the appellant/father-assessee.

27. The second substantial question of law relates to the maintainability of the application under Section 154. The Assessing Officer rejected the application under Section 154 by a one line order. It was set aside by the Commissioner of Income Tax (Appeals). The Tribunal held that the issue raised by the assessee will fall under the category of a "debatable issue" and not "error apparent". We think that is a correct view taken by the Tribunal.

28. While the treatment of the payment made by M/s. Siemens Limited at the hands of the appellant herein, after it was treated differently at the hands of M/s. Siemens Limited can, given some allowance, be treated as an error apparent, the moment it is shown to have been rejected in the order of Assessment, it would become at the most a mistake correctable on an appeal but not an error apparent. Hence, the second substantial question of law is also to be answered against the appellant/assessee.

29. Coming to the two appeals filed by the son-assessee namely T.C.A.Nos. 167 and 168 of 2012, it is seen that the first substantial question of law is just the same. Therefore, for the reasons that we have indicated in the case of the father, the first substantial question of law in T.C.A.Nos. 167 and 168 of 2012 is also to be answered against the appellant/assessee.

30. The second substantial question of law arising in T.C.A.Nos. 167 and 168 of 2012, is on a weaker wicket them even the first substantial question of law. At least in so far as the first substantial question of law is concerned, the appellant could rely upon the order of the Settlement Commission. But in the case of the payments allegedly received from two different entities there is not even an order of the Settlement Commission. Therefore, the second substantial question of law is also to be answered against the appellant/assessee.

31. In the course of arguments, Mr.K.Subramaniam, learned counsel for the appellant requested us to frame additional substantial question of law in T.C.A.Nos.167 and 168 of 2012. The additional substantial question of law that he wanted us to frame reads as follows:-

> "Whether on the facts and in the circumstances of the case, the Income Tax Appellate Tribunal was right in not observing that the notice under

Section 143(2) for the Assessment Year 2002-03 was issued after the expiry of the period prescribed for the issue of notice under Section 143(2) under the proviso (ii) of the said sanction and therefore, in not holding that the re-assessment made was illegal and void?"

32. Though this substantial question of law was not raised before the Commissioner of Income Tax (Appeals) or before the Tribunal, it is contended by Mr.K.Subramaniam, on the basis of the decision of the Supreme Court in Commissioner of Income Tax vs. Mastek Limited [358 ITR 252 (SC)] and another decision in Commissioner of Income Tax vs. Engineers India Limited [364 ITR 686 (SC)] that proviso to Sub-Section (4) of Section 260-A empowers this Court to frame additional substantial questions of law.

33. We have no doubt in our mind that this Court has the power to frame an additional substantial question of law provided the two conditions laid down in Sub-Section (4) of Section 260-A are satisfied. But unfortunately, the question of limitation which is sought to be raised as an additional substantial question of law, is not a pure and simple question of law. The question of limitation is a mixed question of fact and law. Therefore, unless it had been raised and a finding of fact reached in favour of the appellant, it is not possible for the appellant to raise it in the course of second appeal proceedings. If it is a pure and simple question of law or if it is a mixed question of fact and law on which the fact has already been held in favour of the appellant, we would certainly take up the additional substantial question of law for consideration. But that is not clear. Therefore, we do not propose to take up the third question of law.

34. In the light of the above, the substantial questions of law raised are answered against the appellant/assessee. The appeals are dismissed. Consequently, M.P.Nos. 1 of 2015 are closed.

Sd/-
Assistant Registrar(CS-VII)

//True Copy//

Sub Assistant Registrar

To

1. Income tax Appellate Tribunal Bench 'A', Chennai.

2. The Income Tax (Appeals) IX,
No.121, Mahatma Gandhi Road,
Chennai 34.

3. The Income Tax Officer,
Ward IX(1) Chennai.

4. The Income Tax Officer,
Ward IX (3) Chennai.

1 cc to Mr.M.Swaminathan, Advocate, sr.14750
2 ccs to Mr.K.Subramanian, Advocate, sr.15169

T.C.(A) Nos.167 to 174 of 2012

scd co
kra 08.06.2016