IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 01.07.2016

CORAM:

THE HONOURABLE MR.JUSTICE S.MANIKUMAR
and
THE HONOURABLE MR.JUSTICE D.KRISHNA KUMAR

T.C.A.Nos.379 to 382 of 2016
C.M.P.No.8548 to 8550 of 2016

Commissioner of Income-Tax,
Central II, Chennai-34. .. Appellant in all TCAs.

versus

M/s.Kaleesuwari Refinery Pvt. Ltd.,
No.53, Rajasekaran Street,
Mylapore, Chennai 600 004. .. Respondent in T.C.A.Nos.379 & 380/16

M.Arun,
No.64, Teugu Chetty Street,
Old Washermanpet,
Chennai 600 021. .. Respondent in T.C.A.Nos.381 & 382/16

Prayer in T.C.A.Nos.379 & 380 of 2016: Tax Case Appeals filed under Section 260A of the Income Tax Act, 1961, against the orders of Income Tax Appellate Tribunal,"B" Bench, Chennai, made in I.T.A.Nos.138 and 139/Mds/2012, dated 24.01.2013.

against the Common order of the commissioner of Income Tax (A) II, Chennai dt.24.10.11 and made in ITA.Nos.359, 360/10-11 for the Assessment Year 2008-09, 2009-10,

against the order of the Assistant Commissioner of Income Tax, Central Circle II(4), Chennai dt.31.12.2010 and made in PAN.AAACK6087A for the Assessment year 2008-09 & 2009-10 respectively.

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Prayer in T.C.A.Nos.381 & 382 of 2016: Tax Case Appeals filed under Section 260A of the Income Tax Act, 1961, against the orders of the Income Tax Appellate Tribunal, "B" Bench, Chennai, made in I.T.A.Nos.143 and 144/Mds/2012, dated 24.01.2013,

against the order of the Commissioner of Income Tax,(Appeal) II, Chennai-34 dt.27.10.2011 and made in PAN.AAGPA8202L for the Assessment year 2008-09, 2009-10 respectively,

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against the order of the Assistant Commissioner of Income Tax, Central Circle II(4), Chennai dt.31.12.2010 and made in PAN.AAGPA8202LA for the Assessment year 2008-09, 2009-10 respectively.

For Appellant :Mr.R.Senthil Kumar,
Senior Standing Counsel for Income-Tax

COMMON ORDER
(Order of the Court was made by S.MANIKUMAR, J.)

As all the appeals arise out of same pleadings, except for the difference, in the name of the assessees, for the assessment years 2008-2009 and 2009-2010 respectively, and the substantial questions of law raised in all the appeals being the same, the appeals are disposed of by a common order.

2. Short facts leading to the appeals are that M/s.Kaleesuwari Refinery Private Limited, Chennai, engaged in manufacture and trading of edible oils, was subject to a search under Section 132 of the Income Tax Act, 1961 on 16.07.2008. During the course of search proceedings, a laptop was retrieved from one Shri Kumarasamy, an official of the assessee company. The Assessing officer found that certain differences in the closing stock as on 31.03.2008, were recorded in the laptop. Notices were issued to M/s.Kaleesuwari Refinery Private Limited, Chennai and M.Arun, assessees, to explain the discrepancies. Assessees explained that the stock of M/s. Kaleesuwari Refinery Private Limited, Chennai was mixed up with the stock of M/s. Arun Oil Trade and M/s.GMS Traders. Further explanation of the assessees was that M.Arun is the Proprietor of M/s.Arun Oil Trade and M/s.GMS Traders and holding 80% of shares in M/s.Kaleesuwari Refinery Private Limited, Chennai and M.Arun, was also a Director in M/s.Kaleesuwari Refinery Private Limited, Chennai.

3. M/s.Kaleesuwari Refinery Private Limited, Chennai and M.Arun, Assessees submitted that they are engaged in manufacture and trading of edible oil. Before the Assessing Officer, the assessees contended that the physical verification and stock, in the premises of M/s.Kaleesuwari Refinery Private Limited, Chennai and found in laptop, belonged to all the concerns, namely M/s.Kaleesuwari Refinery Private Limited, Chennai, M/s.Arun Oil Trade and M/s.GMS Traders, and should be compared, taking into account the above facts. It is also the contention of the assessees that refinery of oil is done on job work basis.

4. During the assessment proceedings, the assessees also contended that the stock available in the premises of the assessee, M/s.Kaleesuwari Refinery Private Limited, was stock of M/s.Kaleesuwari Refinery Private Limited, Chennai, M/s.Arun Oil

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Trade and M/s.GMS Traders and though different tanks were marked with M/s.Kaleesuwari Refinery Private Limited, Chennai, M/s.Arun Oil Trade etc., for all practical reasons of production and manufacture, it was never possible for the assessees to maintain the stocks separately, for each of these entities, at all times.

5. The Assessing Officer rejected the submissions of the assessees by stating that storage tanks are clearly demarcated for M/s.Kaleesuwari Refinery Private Limited, Chennai and M/s.Arun Oil Trade and the accounting system of the assessees provides, for entries of the stock which were moved from one tank to another, and into the main tank. The Assessing Officer held that the stocks need not be seen in totality, but should be compared independently and accordingly arrived at the excess/deficit stock of items of M/s.Kaleesuwari Refinery Private Limited, Chennai and M/s.Arun Oil Trade, for assessment year 2008-09 (based on the statement from the laptop of Shri Kumarasamy) and for assessment year 2009-10 (based on physical stock taken on 16.07.2008. Thus, in the case of M/s.Kaleesuwari Refinery Private Limited, Chennai, the Assessing officer, treated the excess stock, as unexplained investment and 10% of the deficit stock, as unexplained income generated out of unaccounted sales for the assessment years 2008-09 and 2009-10, respectively, and accordingly passed orders on 31.12.2010 for the Assessment years 2008-09 and 2009-10, respectively.

6. For the respondent, Mr.M.Arun, in TCA Nos.379 & 380 of 2016 and the respondent in TCA Nos.381 & 382 of 2016, the Assessing officer, vide orders dated 31.12.2010 rejected the contentions of the assessee that the stocks of the above mentioned three concerns viz., M/s.Kaleesuwari RefineryPrivate Limited, Chennai, M/s.Arun Oil Trade and M/s.GMS Traders, have to be recorded together in an aggregate manner, while working out any discrepancy in the stock, and the excess stock, recorded in the laptop.

7. Being aggrieved by the orders of the assessing officer, dated 31.12.2010, for the assessment years 2008-09 and 2009-10, M/s.Kaleesuwari Refinery Private Limited, Chennai, filed I.T.A.Nos.359 & 360/10-11 before the Commissioner of Income Tax (Appeals)-II and Assessee M.Arun has also filed appeals in ITA Nos.383 & 384/10-11.

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8. In the case of Assessee M/s.Kaleesuwari Refinery Private Limited, Chennai, after considering the submissions of the parties and the material on record, the Commissioner of Income Tax (Appeals)-II vide common order in ITA Nos.359 and 360/10-11 dated 24.10.2011 for the assessment years 2008-09 and 2009-10, partly allowed the appeals.

9. For the assessment year 2008-09, in the case of the assessee, Mr.M.Arun, the Commissioner of Income Tax (Appeals), vide

order dated 27.10.2011 in ITA No.383/10-11, has ordered as hereunder,

> "8. This issue has been dealt by me in the appellate order in the case of M/s.Kaleesuwari Refinery Private Limited (KRPL) for assessment years 2008-09 and 2009-10 (Order, dated 24.10.2011 in I.T.A.Nos.359-360/10-11) wherein I have held that the entire excess/deficit stock found during the search has to be considered in the hands of M/s.KRPL only. Since the entire excess/deficit stock has been considered in the hands of M/s.KRPL, addition of Rs.16,17,431/- made on account of deficit stock in the hands of the appellant is deleted."

10. While considering the same issue in ITA No.384/10-11 for the assessment year 2009-10, in the case of the assessee, M.Arun, after considering the rival submissions, the appellate authority, Commissioner of Income tax Appeals - II, Chennai, vide order dated 27.10.2011, at paragraphs 5 and 6, ordered as follows:

> (i) Addition on account of excess/deficit stock - page 14 (ITA No.384/10-11)
>
> "5. In the assessment order A.O had made the following additions on account of excess / deficit stock found during the search in the case of M/s.Kaleesuwari Refinery Private Limited:
>
> Unaccounted Sales (Deficit stock of loose oil) Rs.38,14,084/-
>
> Unaccounted income (Excess stock of loose oil) Rs.1,93,37,683/-
>
> Unaccounted Sales (Deficit Stock of finished goods) Rs.17,648/-
>
> Unaccounted income (excess stock of finished Goods) Rs.8,64,830/-
>
> 6. This issue has been dealt by me in the appellate order in the case of M/s.Kaleesuwari Refinery Private Ltd., (KRPL) for assessment years 2008-09 and 2009-10 (Order, dated 24.10.2011 in I.T.A.Nos.359-360/10-11) wherein I have held that the entire excess/deficit stock of loose oil found during the search has to be considered in the hands of M/s.KRPL only. Since the entire excess/deficit stock of loose oil has been considered in the M/s.KRPL, addition of Rs.38,14,084/- and Rs.1,93,37,683/- made on account of deficit stock of loose oil in the hands of the appellant is deleted."

11. Being aggrieved by the order of the appellate authority in the case of the assessee M/s.Kaleesuwari Refinery Pvt. Ltd., and the assessee, M.Arun, the Assistant Commissioner of Income Tax, Central Circle II(4), has filed appeals in ITA Nos.138 & 139/Mds./2012 (M/s.Kaleesuwari Refinery Pvt. Ltd., Chennai) and ITA Nos.143 & 144/Mds/2012 (M.Arun)

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12. After considering the case of the parties to the appeals, stated supra, vide order dated 24.01.2013, the Income Tax Appellate Tribunal, Chennai has ordered, as hereunder,

"9. ... There is no dispute that the assessee, M/s.Arun Oil and M/s.GMS Traders were functioning in the same premises. There is also no dispute that search was conducted in the premises form which all the three concerns were working. Therefore, physical stock as found at the point of search, namely on 16.07.08 could have been that of all the three concerns only. It might be true that assessee had maintained separate account books for each concern and had demarcated physical storage tanks. However, there is much force in the contention of the assessee that practically it might not have been possible to keep the stock of raw material and stock of finished goods separately earmarked. When imported raw oil was receive, it would have been necessary to load it in tanks according to the available capacities of the tank, ignoring the specific names given on the tank. No prudent businessmen would in such situation, clear a tank or return the imported oil for want of space in an earmarked tank. Preponderance of probability is that stock could have been mixed up. This is the same, whether it was for working out the stock discrepancies as on 31.03.2008 and as on 16.07.2008. Assessing Officer had considered each concern separately for working out the deficit / surplus stock ignoring ground realities of a business. Insofar as profit of 10% taken on deficit stock is concerned, there is no dispute between two parties. Thus, in our opinion, the Ld.CIT(A) was justified in taking a global view for making the analysis of deficit/surplus, i.e., considering the stock of all the three concerns together. No doubt, the deficit and surplus were considered for addition in the hands of assessee only, though there were three concerns working from same premises. But in practical situation, this might have been the only possible method for resolving the issue. Practical limitations of business functioning has to be given its own importance, and this might not be always compatible with the accounting systems used. Once 10% of the deficit stock is taken as profit, no doubt such amount will be available with the assessee to explain the excess stock, at least to that extent. In our opinion, Ld.CIT(A) was justified in allowing the telescoping of the profit on deficit stock with the excess stock. Similarly once excess stock was determined and added for A.Y.2008-09, such excess stock would be available in the opening for the next year. Therefore, excess stock worked for A.Y.2009-10 has necessarily to exclude the excess stock addition made for

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A.Y.2008-09. We cannot fault this view taken by the CIT (A) either. We are of the opinion that the order of the CIT (A) cannot be disturbed. Appeals for both the years are dismissed."

13. Thus the appeals preferred before the Income Tax Appellate Tribunal, Chennai in ITA Nos.138 & 139/Mds./2012 in the case of assessee M/s.Kaleesuwari Refinery Private Limited and in ITA Nos.143 & 144/Mds./2012, in the case of assessee M.Arun, have been dismissed.

14. Being aggrieved by the order of Income Tax Appellate Tribunal, Chennai, in ITA Nos.138 & 139/Mds./2012 in the case of assessee M/s. Kaleesuwari Refinery Private Limited and in ITA Nos.143 & 144/Mds./2012 and in the case of assessee, M.Arun, Proprietor of M/s.Arun Oil Trade and M/s.GMS Traders, Tax Case Appeals No.379 & 380 of 2016 and 381 & 382 of 2016, have been filed, on the following substantial questions of law.

> "Whether on the facts and in the circumstances of the case, the Appellate Tribunal was right in deleting the 10% of the deficit stock which was considered as income from unaccounted sales for the assessment years 2008-09 and 2009-10?"

15. Though, Mr.T.R.Senthil Kumar, learned senior standing counsel assailing the correctness of the orders stated supra, made submissions on the substantial questions of law, contending inter alia that

> "d. the Appellate Tribunal and the CIT[A] erred in accepting the contention of the assessee that the stock of the three concerns were to be reckoned together in an aggregate manner, while working out any discrepancy and considered the excess stock as recorded in the laptop as unaccounted investment of the assessee.
>
> e. The Appellate Tribunal and the CIT[A] erred in deleting the 10% of the deficit stock was considered as income from unaccounted sales for both the assessment years.
>
> f. The Appellate Tribunal erred in directing the assessing officer to given credit for the opening excess stock also while computing the addition for the assessment year 2009-10"

and prayed for an answer on the substantial question of law in favour of the revenue, going through the material on record and the orders of both the appellant authority and tribunal, we do not find any manifest error. On the other hand, we are of the considered opinion that orders of the appellate authority and appellate tribunal, are very much a plausible view, on appreciation of the material on record, and essentially, a finding of fact.

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16. A substantial question of law does not arise on the findings of fact, unless it is substantiated that there is perversity. In Bhagat Construction Co. (P) Ltd., v. CIT reported in (2001) 250 ITR 291 (Del.), the Delhi High Court held that a question of fact, becomes a question of law, if the finding is either without any evidence or material or, if the finding is contrary to the evidence, or is perverse or there is no direct nexus between the conclusion of fact and the primary fact upon which that conclusion is based. But it is not possible to turn a mere question of fact into a question of law by asking whether as a matter of law the authority came to the correct conclusion on a matter of fact.

17. In M.Janardhana Rao v. Joint CIT reported in (2005) 273 ITR 50 (SC), the Hon'ble Supreme Court held that in the exercise of the powers under Section 260A, the findings of fact of the Tribunal cannot be disturbed. In the said judgment, the Apex Court further held that the tests for determining whether a substantial questions of law, is involved in an appeal are,

(a) whether directly or indirectly it affects substantial rights of the parties, or

(b) the question is of general public importance, or

(c) whether it is an open question in the sense that the issue is not settled by a pronouncement of the Supreme Court or Privy Council or by the Federal Court, or

(d) the issue is not free from difficulty, or

(e) it calls for a discussion for alternative view.

18. We have given our careful consideration, as to how both the appellate authority and the tribunal have considered the facts of the case and rendered findings, on the rival submissions of the parties. On the aspect of deleting 10% of the deficit stock, dealt with by both the appellate authority and the appellate Tribunal, we are unable to subscribe to the contentions of the appellant, in all the appeals before us, that there is any substantial question of law. Going through the material on record, we are of the considered view that the concurrent findings of fact, rendered by the CIT (Appeals) and the Income Tax Appellate Tribunal, do not call for any interference, as no substantial question of law, is involved.

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19. Though, Mr.T.R.Senthil Kumar, learned Senior Standing Counsel contended that Circular No.21 of 2015 authorises the revenue to maintain appeals, de hors the monetary ceiling limit, on the facts and circumstances of the each case, we are of the considered view that the appellant, in all the appeal, has not made a case for interference, both on law and facts.

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20. In the result, all the appeals are dismissed. No costs. Consequently, connected Miscellaneous Petitions are also closed.

Sd/-
Asst.Registrar

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Sub Asst. Registrar

To
1.The Income Tax Appellate Tribunal,
B Bench, chennai.

2.The Commissioner of Income Tax (A) II,
Chennai.

3.The Assistant Commissioner of Income tax,
CentralCircle II (4)
Chennai.

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