

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 20.07.2017

CORAM :

The Hon'ble Ms.INDIRA BANERJEE, CHIEF JUSTICE

AND

The Hon'ble Mr.JUSTICE M.SUNDAR

Tax Case Appeal No.303 of 2017

Principal Commissioner of Income Tax 4,
No.121, Nungambakkam High Road,
Chennai-600 034. ... Appellant/Appellant

Vs.

Hemalatha Rajan ... Respondent/Respondent

Tax Case Appeal is preferred under Section 260A of the Income Tax Act, 1961 against the order of the Income Tax Appellate Tribunal, Madras 'A' Bench, dated 30th November 2016 in ITA No.02/Mds/2016 preferred against the Order dated 19.10.2015 made in I.T.A.No.60/2013-14 on the file of the Commissioner of Income Tax (Appeals) Chennai filed against the Order dated 30.07.2013 on the file of the Deputy Commissioner of Income Tax Company vide-IV(1) Chennai for the Assessment year 2009-2010.

For Appellant : Mr.Karthik Ranganathan

JUDGMENT

The Hon'ble Chief Justice and M.Sundar, J.

This is a Tax Case Appeal under Section 260A of the Income Tax Act, 1961 (hereinafter referred to as 'IT Act' for brevity).

2 A thumbnail sketch of facts necessary for appreciating this order are set out infra under the caption 'Factual Matrix'.

3 FACTUAL MATRIX :

3(a) The Income Tax Department, i.e., Principal Commissioner of Income Tax 4, No.121, Nungambakkam High Road, Chennai-600 034

is the appellant before us. The appellant is hereinafter referred to as 'Revenue' for the sake of clarity and convenience.

3(b) Assessee, who is an individual, is the sole respondent before us. The respondent is referred to as 'Assessee' for the sake of clarity and convenience. The assessment year, which is subject matter of this appeal is 2009-10 and the same shall hereinafter be referred to as the 'said assessment year' for convenience and clarity.

3(c) Assessee filed return of income for the said assessment year on 31.3.2010, declaring a total income of Rs.1,93,15,945/-. The return was processed under Section 143(1) of the IT Act on 23.03.2011 and subsequently, the case was selected for scrutiny by issue of notice under Section 143(2) of the IT Act on 20.8.2010. A detailed questionnaire was issued to the Assessee on 28.6.2011. In response to the questionnaire and subsequent notices issued from time to time, the authorised representative of the Assessee appeared before the Assessing Officer (hereinafter referred to as 'AO' for brevity) from time to time and submitted the details called for. On the basis of the details furnished, the assessment was completed. In the assessment order, a sum of Rs.3.82 crores was added by the AO under Section 28(va) of the IT Act. This sum of Rs.3.82 Crores was received by the Assessee from a Dutch company for relinquishing her right to sue for damages. Assessee's contention that this is a capital receipt was turned down and the AO treated the same as revenue receipt.

3(d) Thereafter, owing to the above said addition, separate penalty proceedings under Section 271(1)(c) of the IT Act were initiated against the Assessee. In and by order dated 30.7.2013, the Deputy Commissioner of Income Tax, Company Circle-IV(1), Chennai imposed a penalty of Rs.89,84,690/- being an amount equivalent to tax, which according to the said authority was the tax sought to be evaded by the Assessee by reason of the alleged concealment of particulars of income. The order of penalty came to be passed on the basis that the Assessee has concealed income in the nature of 'success sharing bonus' to the tune of Rs.2,67,60,000/- being the money received by her from the Dutch company as aforesaid for giving up her right to sue for damages.

3(e) Aggrieved, Assessee preferred a statutory appeal before the Commissioner of Income Tax (Appeals)-8, Chennai-600 034 (hereinafter referred to as 'CIT(A)' for brevity). After a detailed hearing in the statutory appeal, the CIT(A), exercising his appellate powers under Section 250(6) of the IT Act allowed the appeal and cancelled the penalty. CIT(A) came to the conclusion that there is no concealment and that the issue as to whether success sharing bonus is capital receipt or revenue receipt is debatable.

3(f) Not satisfied with the decision of the CIT(A), Revenue filed a statutory appeal before the Income Tax Appellate Tribunal, "A" Bench, Chennai (hereinafter referred to as 'ITAT'

for brevity). This appeal by the Revenue is I.T.A.No.02/Mds/2016. ITAT also came to the conclusion that the aforesaid issue is debatable, that there is no concealment of income and confirmed the above said order of CIT(A), wherein the CIT(A) has allowed the appeal and cancelled the penalty.

3(g) Not satisfied with the order of ITAT, Revenue has preferred the instant appeal before us under Section 260A of the IT Act on two questions, which according to the Revenue are substantial questions of law. We shall deal with the said two questions in the later part of this judgment.

3(h) Before proceeding with the discussion of the case, this being a thumbnail sketch of facts, we deem it appropriate to also set out a detailed factual matrix with regard to how and the circumstances under which the payment received from a Dutch company by the Assessee (which is the crux of the matter) arose.

4 DETAILED FACTUAL MATRIX :

4(a) The Assessee is a Promoter Director and her spouse is the Managing Director of a public limited company incorporated in India in the name and style Ma Foi Management Consultants Ltd. (hereinafter referred to as 'Ma Foi' for brevity). The said company is providing Human Resource Services. It is the case of Assessee that as part of its expansion strategy, the company entered into a strategic alliance with a company based in Netherlands, which goes by name Vedior NV. Through an agreement entered with Vedior NV, Assessee sold 82.48% of the total equity shareholding of her company, i.e., Ma Foi to the said Vedior NV. In the agreement, it is not in dispute that there was a clause, which granted preemptive rights to the assessee to re-acquire the shares of Ma Foi if and when Vedior NV wishes to sell out the shares of Ma Foi to a third party. According to this clause, the Assessee was to be offered such shares at the prices at which any third party has expressed its readiness to purchase. Only if the Assessee is unable to purchase the share at the value stated therein within a period of thirty days from the date of offer, the Netherlands based company, i.e., Vedior NV, will have the right to transfer such shares to a third party.

4(b) However, Vedior NV entered into a deal with another company, being Randstad, wherein and whereby Vedior NV was taken over by Randstad. The acquisition by Randstad was acquisition of Vedior NV as a whole. Aggrieved by the action of Vedior NV, the Assessee issued a legal notice to Vedior NV, alleging that by virtue of being taken over by Randstad, her shares (which were sold to Vedior NV) also stood transferred to Randstad. This, according to the Assessee, has violated and breached her right of preemptive purchase of shares of Ma Foi.

4(c) In the said assessment year (i.e., 2009-10), there was a settlement between Assessee and Randstad. In the settlement,

Randstad offered to monetarily compensate the Assessee in a sum of Rupees one million Euro, if she withdraws the notice to Vedior NV. The settlement fructified and Randstad paid off the Assessee for not proceeding further with the legal notice and dropping the intended proceedings. This payment made by Randstad to Assessee in Indian currency is Rs.2,67,60,000/-. Though the Assessee had received the said sum, she had not offered it for assessment as her income (revenue receipt) in her returns for the said assessment year. Whether this is a capital receipt or a revenue receipt is the crux and gravamen of this case. We now proceed to discuss the case under the caption 'Discussion' infra.

5 DISCUSSION :

5(a) In proceedings under Sections 143(2) and 142(1) of the IT Act, the Assessee, in response to the notices, took the stand that the above said sum so received from Randstad is of capital nature and therefore, not taxable under the IT Act as it is not a revenue receipt. Assessee contended that the said sum was received by her on an agreement to refrain from endorsing her contractual rights, namely, her right of first refusal qua purchase of Ma Foi shares. According to Assessee, this arises out of a share purchase agreement, which was under breach and therefore, the receipt is a capital receipt and not a revenue receipt. The AO did not accept this argument and added the aforesaid sum to the returned income. Effectively, the AO added Rs.3.82 crores under Section 28(va) of the IT Act.

5(b) To be noted, with regard to tax on such added component, Assessee carried the same in appeal. During first appellate proceedings, CIT(A) held that taxing the same under Section 28(va) of the IT Act is incorrect and changed the head of income. CIT(A) held it to be taxable under the head 'income from other sources' and invoked the provisions of Section 56 of the IT Act. The matter was carried to ITAT. ITAT held against the appellant and treated the same as revenue receipt. The relevant order of ITAT is dated 20.12.2012 made in I.T.A.No.1776/Mds/2012 and 1777/Mds/2012. Aggrieved by the order of ITAT, the appellant / assessee preferred an appeal before this Court. This Court has admitted the appeal of the assessee vide Tax Case Appeal No.93 of 2013 (spouse K.Pandiarajan's case on the same issue is T.C.A.No.92 of 2013). This court also has granted an interim stay with regard to recovery of tax arrears. That Tax Case Appeals are pending in this court. It is not in dispute before us.

5(c) However, owing to the above said addition alleging that the same is willful concealment and non disclosure of income, separate penalty proceedings were initiated and penalty equivalent to a sum of tax allegedly sought to be evaded was levied. Such penalty was levied under Section 271(1)(c) of the

IT Act as mentioned supra. This penalty component alone was assailed by the Assessee before the CIT(A) successfully as set out supra. CIT(A), relying on the ratio in various reported judgments that a debatable issue cannot be the foundation for levy of penalty, came to the conclusion that this is not a fit case for imposition of penalty.

5(d) CIT(A) noticed that the issue whether it is a revenue receipt or a capital receipt is res integra as the matter is pending in this Court. Besides this, CIT(A) also relied on a decision of ITAT in the case of Assessee's spouse where the same has been put in issue. ITAT, in the case of Assessee's spouse vide I.T.A.No.54/Mds/2015 dated 12.6.2015, had cancelled the penalty levied on the same issue, observing that it is not a dispute regarding disclosure of information relating to income as all relevant particulars pertaining the contentious receipt had been produced and that it was only a question whether to treat this as revenue receipt or capital receipt.

5(e) As stated supra, this was carried in appeal to the ITAT by the Revenue. ITAT concurred with the finding returned by the CIT(A) and held that the issue is not clear and debatable as this Court (Madras high Court) is in seizin of the matter in T.C.A.Nos.92 and 93 of 2013, which have been admittedly pending and interim order granted therein is operating.

5(f) We, therefore, examined two perspectives of the matter. One perspective is, when a particular issue is debatable or when a particular matter is res integra and when Assessee takes a position that is favourable to the Assessee, can that be treated as concealment or non disclosure for the purpose of penalty proceedings under Section 271(1)(c) of the IT Act. To be noted, in the instant case, the issue is res integra in the Assessee's case itself. The second perspective is considering the facts and circumstances of the case, as also the trajectory it has taken in reaching this court from the AO via CIT(A) and ITAT, does any substantial question of law arise under Section 260A of the IT Act.

5(g) With regard to the first perspective, learned counsel for Revenue Mr.Karthik Ranganathan fairly submitted that there is no dispute that the issue as to whether relevant payment received by Assessee from the Dutch company towards giving up her right for right to sue for damages on account of breach is in the nature of 'success sharing bonus' and whether such 'success sharing bonus' is to be treated as revenue receipt or capital receipt is clearly res integra in T.C.A.Nos.92 and 93 of 2013 in this Court. In other words, this court is in seizin of the matter. As a consequence, learned counsel for the Revenue is not in a position to debate or dispute that the issue on the

date of filing of the returns by the Assessee in the instant case was clearly debatable. As the issue was debatable, Assessee has taken the position that is favourable to her and treated the same as capital receipt. Otherwise, there is no deliberate concealment or non disclosure.

5(h) By a long catena of authorities, Courts have repeatedly held that for imposition of penalty under Section 271(1)(c) of the IT Act, 'mens rea' is most important. In other words, in a plethora of authorities, Courts have repeatedly held that in the absense of mens rea on the part of Assessee to conceal the income or deliberate non disclosure, penalty proceedings cannot be initiated. To be noted, as far as tax component is concerned, the same has been levied and it is now the subject matter of T.C.A.Nos.92 and 93 of 2013, which will be decided independently on the merits of the matter.

5(i) We further put it to the learned Standing Counsel for Revenue as to how he attempts to sustain penalty proceedings when it cannot be disputed that the lone issue which is the crux of the matter is debatable. To this, learned Standing Counsel for Revenue replied by taking us through Section 275 of the IT Act. Learned Standing counsel for Revenue would submit that there is a cap qua time frame for imposing penalty, if they await the outcome of T.C.A.Nos.92 and 93 of 2013, it will become too late for them to impose the penalty and therefore, they have commenced penalty proceedings and imposed penalty on the Assessee, though the issue is, indisputably, debatable.

5(j) This submission, though attractive at first blush, on a closer scrutiny does not find favour with us. The reason is, the question before us is whether the conduct of the Assessee in filing returns in the instant case, is one that warrants imposition of penalty owing to non disclosure / concealment. Assuming for a moment, if this court later returns a finding in the above said Tax Case Appeal that the receipt in question from the Dutch company should be treated as revenue receipt and not as capital receipt, that would not in any manner lead to the conclusion that the Assessee is guilty of deliberate non disclosure / deliberate concealment. That decision will only answer the question as to whether the Assessee is liable to pay tax or not. What is to be noted is, as on the date of filing of the return by the Assessee for the said assessment year in the instant case, which is 31.3.2010, the issue is as to whether the relevant payment is revenue receipt or capital receipt was clearly debatable and therefore, Assessee chose to take a position which is favourable for her. This in our opinion does not in any manner qualify as deliberate non disclosure or concealment.

5(k) We do not find any mens rea on the part of the Assessee qua concealment and non disclosure. Therefore, we have no hesitation in coming to the conclusion that this may not be a case which warrants penalty proceedings under Section 271(1)(c) of the IT Act. However, this being an appeal under Section 260A of the IT Act, it can be entertained only on substantial questions of law and not even on questions of law. What is 'substantial question of law' for the purpose of Section 260A of the IT Act has been well elucidated by the Hon'ble Supreme Court of India.

5(1) In M. Janardhana Rao Vs. Joint Commissioner of Income Tax [2005 273 ITR 50 (SC) = (2005) 2 SCC 324], the Supreme Court remanded to the High Court an appeal under Section 260A of IT Act since substantial questions of law were not framed at the time of admission and were framed after the conclusion of arguments. In doing so, it referred to the Apex Court judgment in Sir Chunilal V. Mehta & Sons Ltd. vs Century Spg. & Mfg. Co. Ltd. [AIR 1962 SC 1314] to enumerate the principles regarding substantial question of law. Though Chunilal Mehta's case dealt with Article 133(1) of the Constitution of India which provides for certificate of appeal to be granted by the High Court, if the case involves a substantial question of law of general importance, it was cited by the Apex Court to enumerate the principles regarding the concept of 'substantial question of law'. The same case was referred to by the Supreme Court in Hero Vinoth Vs. Seshammal [(2006) 5 SCC 545] to lay down the principles regarding substantial question of law in an appeal under Section 100 of CPC.

5(m) With regard to 'substantial question of law', the tests laid down by the Supreme Court of India for finding out whether a given set of questions of law are mere questions of law or substantial questions of law is found in Hero Vinoth's case judgment. The ratio laid down by the Supreme Court is found in paragraphs 21 to 23 of the said judgment, which read as follows :

"21. The phrase "substantial question of law", as occurring in the amended Section 100 CPC is not defined in the Code. The word substantial, as qualifying "question of law", means—of having substance, essential, real, of sound worth, important or considerable. It is to be understood as something in contradistinction with—technical, of no substance or consequence, or academic merely. However, it is clear that the legislature has chosen not to qualify the scope of "substantial question of law" by suffixing the words "of general importance" as has been done in many other provisions such as Section 109 of the Code or Article 133(1)(a) of

the Constitution. The substantial question of law on which a second appeal shall be heard need not necessarily be a substantial question of law of general importance. In *Guran Ditta v. Ram Ditta* [(1927-28) 55 IA 235 : AIR 1928 PC 172] the phrase "substantial question of law" as it was employed in the last clause of the then existing Section 100 CPC (since omitted by the Amendment Act, 1973) came up for consideration and their Lordships held that it did not mean a substantial question of general importance but a substantial question of law which was involved in the case. In *Sir Chunilal case* [1962 Supp (3) SCR 549 : AIR 1962 SC 1314] the Constitution Bench expressed agreement with the following view taken by a Full Bench of the Madras High Court in *Rimmalapudi Subba Rao v. Noony Veeraju* [AIR 1951 Mad 969 : (1951) 2 MLJ 222 (FB)] : (Sir Chunilal case [1962 Supp (3) SCR 549 : AIR 1962 SC 1314] , SCR p. 557)

"When a question of law is fairly arguable, where there is room for difference of opinion on it or where the Court thought it necessary to deal with that question at some length and discuss alternative views, then the question would be a substantial question of law. On the other hand if the question was practically covered by the decision of the highest court or if the general principles to be applied in determining the question are well settled and the only question was of applying those principles to the particular fact of the case it would not be a substantial question of law."

This Court laid down the following test as proper test, for determining whether a question of law raised in the case is substantial: (*Sir Chunilal case* [1962 Supp (3) SCR 549 : AIR 1962 SC 1314] , SCR pp. 557-58)

"The proper test for determining whether a question of law raised in the case is substantial would, in our opinion, be whether it is of general public importance or whether it directly and substantially affects the rights of the parties and if so whether it is either an open question in the sense that it is not finally settled by this Court or by the Privy Council or by

the Federal Court or is not free from difficulty or calls for discussion of alternative views. If the question is settled by the highest court or the general principles to be applied in determining the question are well settled and there is a mere question of applying those principles or that the plea raised is palpably absurd the question would not be a substantial question of law."

22. In *Dy. Commr. v. Rama Krishna Narain* [1954 SCR 506 : AIR 1953 SC 521] also it was held that a question of law of importance to the parties was a substantial question of law entitling the appellant to a certificate under (the then) Section 100 CPC.

23. To be "substantial" a question of law must be debatable, not previously settled by law of the land or a binding precedent, and must have a material bearing on the decision of the case, if answered either way, insofar as the rights of the parties before it are concerned. To be a question of law "involved in the case" there must be first a foundation for it laid in the pleadings and the question should emerge from the sustainable findings of fact arrived at by court of facts and it must be necessary to decide that question of law for a just and proper decision of the case. An entirely new point raised for the first time before the High Court is not a question involved in the case unless it goes to the root of the matter. It will, therefore, depend on the facts and circumstance of each case whether a question of law is a substantial one and involved in the case or not, the paramount overall consideration being the need for striking a judicious balance between the indispensable obligation to do justice at all stages and impelling necessity of avoiding prolongation in the life of any lis. (See *Santosh Hazari v. Purushottam Tiwari* [(2001) 3 SCC 179] .) "

5(n) Now, in the light of the above, we examine two questions on which the Revenue wants us to entertain this appeal, which read as follows :

"1. Whether on facts and circumstances of the case the Appellate Tribunal was correct in deleting the penalty levied u/s.271(1)(c) of the Act?

2. Whether on facts and circumstances of the case the Appellate Tribunal was correct in deleting penalty on the ground that assessee's Tax Case Appeal is admitted by the Hon'ble High Court would give rise to the presumption that the issue is debatable?"

5(o) We applied the above tests and examined whether they are mere questions of law or substantial questions of law. As there is nothing of substance, of purport or nothing that would decide the right of parties qua questions of law, we have no hesitation in holding that the two questions of law as propounded by Revenue are not substantial questions of law at all. We are also of the view that they may not even qualify as questions of law as the very language in which the questions are couched would demonstrate that there is a huge factual element built into them.

5(p) Independent of the aforesaid two questions suggested by the Revenue in the Memorandum of Appeal, we also applied our mind to see if any substantial question of law arises in the instant case. To our mind, there is none. Therefore, we have no hesitation in coming to the conclusion that no substantial question of law arises in the instant case.

6 CONCLUSION :

6(a) Owing to all that have been stated supra, the instant case is not fit enough to be entertained under Section 260A of the IT Act. More so, as no substantial question of law arises, the instant appeal deserves to be dismissed.

7 DECISION :

7(a) In the light of all that have been stated supra, particularly under the captions detailed factual matrix and discussion, the instant Tax Case Appeal No.303 of 2017 is dismissed. As we have not issued notice to the respondent, we are not examining the aspect of costs.

Sd/-

Asst.Registrar (CCC)

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Sub Asst. Registrar

vvk

To

1. The Income Tax Appellate Tribunal,
'A' Bench, Chennai.

2.The Commissioner of Income Tax (Appeals-8)
Chennai.

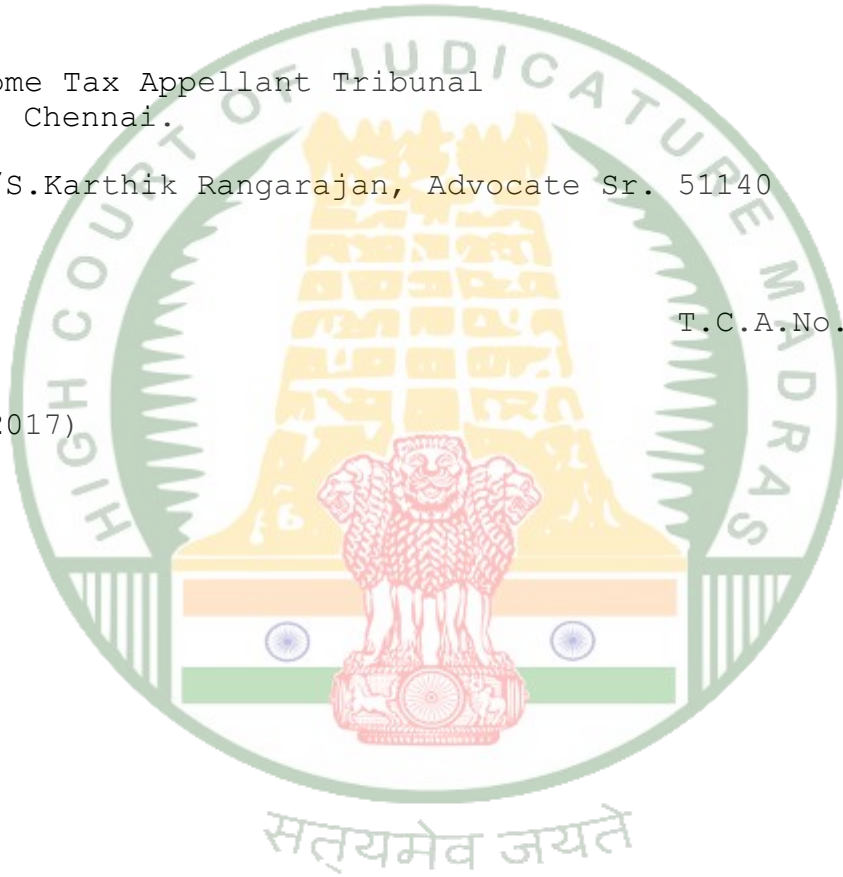
3.The Deputy Commissioner & Income Tax,
Company Circle IV (1)
Chennai.

4.The Income Tax Appellant Tribunal
C Bench, Chennai.

+lcc to M/S.Karthik Rangarajan, Advocate Sr. 51140

T.C.A.No.303 of 2017

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