IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 12.09.2017

CORAM :

The Hon'ble Ms.INDIRA BANERJEE, CHIEF JUSTICE

AND

The Hon'ble Mr.JUSTICE M.SUNDAR

Tax Case Appeal No.377 of 2017

Principal Commissioner of Income Tax 1
No.63, Race Course Road,
Coimbatore-641 018. .. Appellant

Vs.

Dr.D.Ramamurthy .. Respondent

Tax Case Appeal is preferred under Section 260A of the Income Tax Act, 1961 against the order of the Income Tax Appellate Tribunal, 'C' Bench, Chennai dated 28th September 2016 in ITA No.1851/Mds/2016 preferred against the order dated 29.04.2016 of the Commissioner of Income Tax(Appeals I) , Coimbatore in appeal No 111/18-16 preferred against the orders passed under Section 143(3) of the Income Tax Act 1961, on 31.03.2015 fot the assessment year 2012-2013 for PAN No ADCPR 2167 E by the Joint Commissioner of Income Tax , Non Corporate Range 2, Coimbatore.

For Appellant : Mr.T.R.Senthilkumar

For Respondent : Mr.R.Vijayaraghavan
for M/s.Subbaraya Aiyar Padmanabhan

JUDGMENT

(Judgment of the Court was made by The Hon'ble Chief Justice)

This appeal is against an order dated 28th September 2016 passed by the Income Tax Appellate Tribunal, “C” Bench, Chennai, allowing the appeal of the Assessee being ITA No.1851/Mds/2016 relating to Assessment Year 2012-13 against the order dated 29th April 2016 passed by the Commissioner of Income Tax (Appeals)-1, Coimbatore dismissing the Assessee's appeal No.111/15-16 against an order of assessment dated 31.3.2015.

2 The Respondent Assessee, a Doctor by profession and Proprietor of a concern 'The Eye Foundation', transferred his assets to the partnership firm constituted on 1st April 2011, by way of his contribution to the partnership assets.

3 A partnership deed was executed on 1st April 2011 by seven partners including respondent Assessee and the capital contribution of the respondent Assessee was shown to be Rs.2,98,00,000.00. On or about 29th June 2011, the partnership firm was converted into a private company limited by shares. Upon such conversion, the assets of the partnership firm stood vested in the company and the shares were allotted to the partners in the proportion of their share in the assets of the partnership firm.

4 Before the private limited company was constituted, the shares of the partnership firm had been revalued. According to the respondent Assessee, the revaluation was done on or about 29th May 2011. The Assessing Officer, however, passed an order of assessment computing capital gains on the basis of the revalued value of assets.

5 The only question before the Tribunal was whether assessment would have to be done on the basis of the value of assets as on 1st April 2011 when partnership firm was constituted or revalued value of assets. In this context, it would be perhaps pertinent to note that it is the contention of the Revenue that assets were actually revalued before 1st April 2011 and the value of assets was much higher on 1st April 2011 than what was shown in the deed of partnership.

6 Learned Tribunal found that the legislative intention in bringing Section 45(3) of the Income Tax Act to the statute as stated in the memorandum explaining the clauses to the Finance Bill were as follows:

> “As per the existing provisions of section 45 of the Income-tax Act profits or gains arising from the transfer of a capital asset are chargeability to income-tax as capital gains in the year in which the transfer took place. With a view to preventing misuse of entities such as partnership firms, etc., as escape routes for avoiding capital gain tax, the Bill by inserting a new sub-section (3) in section 45 seeks to provide for charging to tax of the profits or gains arising from transfer of a capital asset by a partner to a firm or by a member to an association of persons or body of individuals or

> VICE VERSA. In view of the practical difficulties in evaluating the consideration for transfer in such cases, the bill seek to provide certain deeming provisions as well. Thus, in a case in transfer of a capital asset by a partner to a firm or by a member to association of persons or body of individuals, the amount recorded in the books of account of firm, association or body as the value of the capital asset, shall be deemed to be the full value of consideration as a result of such transfer. By way of distribution of capital asset by a firm association of persons or body of individuals, the FAIR MARKET VALUE, of the assets as on the date of transfer shall be deemed to be the full value of consideration as a result of such transfer consequential amendment to sections 47 and 49 have also been proposed."

7 By an explanatory Circular No.495 dated 22nd September 1987, the Central Board of Direct Taxes (CBDT) clarified as under :

> "24.2 With a view to blocking this escape route for avoiding capital gain tax, the Finance Act, 1987 has inserted new sub-section (3) in section 45. The effect of this amendment is that profits and gains arising from the transfer of a capital asset by a partner to a firm shall be chargeable as the partner's income of the previous year in which the transfer took place. For purpose of computing the capital gains, the value of the asset recorded in the books of the firm on the date of the transfer shall be deemed to be full value of consideration received or accrued as a result of the transfer of capital asset."

8 From the statement in the memorandum explaining the clauses to the Finance Bill, as also the said circular No.495 dated 22nd September 1987, it is patently clear that it was the legislative intent that, for the purpose of computing the capital gains, value of assets recorded in the books of the firm on the date of transfer would be deemed to be the full value of consideration received or accrued as a result of the transfer.

9 In the backdrop of the aforesaid legal position, the question is what was the value of the assets as on 1st April 2011? The value would necessarily have to be the value as recorded in the books of the firm as on 1st April 2011, i.e., the value before the revaluation. More over, as observed above, the learned Tribunal arrived at a factual finding with regard to the value of the assets transferred to the partnership as on 1st April 2011 and rejected the contention of the Revenue that the

value of the assets as revalued would have to be taken into consideration. The learned Tribunal having factually determined the value of the assets in question as on 1st April 2011, this court cannot entertain any appeal under Section 260A of the Income Tax Act, 1961.

10 Section 260A of the Income Tax Act, 1961, provides as follows:

"Section 260A. Appeal to High Court.

(1) An appeal shall lie to the High Court from every order passed in appeal by the Appellate Tribunal before the date of establishment of the National Tax Tribunal, if the High Court is satisfied that the case involves a substantial question of law.

(2) The Principal Chief Commissioner or Chief Commissioner or the Principal Commissioner or Commissioner or an Assessee aggrieved by any order passed by the Appellate Tribunal may file an appeal to the High Court and such appeal under this sub-section shall be-

(a) filed within one hundred and twenty days from the date on which the order appealed against is received by the Assessee or the Principal Chief Commissioner or Chief Commissioner or Principal Commissioner or Commissioner.

(b) [***];

(c) in the form of a memorandum of appeal precisely stating therein the substantial question of law involved.

(2A) The High Court may admit an appeal after the expiry of the period of one hundred and twenty days referred to in clause (a) of sub-section (2), if it is satisfied that there was sufficient cause for not filing the same within that period.

(3) Where the High Court is satisfied that a substantial question of law is involved in any case, it shall formulate that question.

(4) The appeal shall be heard only on the question so formulated, and the respondents shall at the hearing of the appeal, be allowed to argue that the case does not involve such question:

Provided that nothing in this sub-section shall be deemed to take away or abridge the power of the Court to hear, for reasons to be recorded, the appeal on any other substantial question of law not formulated by it, if it is satisfied that the case involves such question.

(5) The High Court shall decide the question of law so formulated and deliver such judgment thereon

containing the grounds on which such decision is founded and may award such cost as it deems fit.
(6) The High Court may determine any issue which -
(a) has not been determined by the Appellate Tribunal; or
(b) has been wrongly determined by the Appellate Tribunal, by reason of a decision on such question of law as is referred to in sub-section (1).
(7) Save as otherwise provided in this Act, the provisions of the Code of Civil Procedure, 1908 (5 of 1908) relating to appeals to the High Court shall, as far as may be, apply in the case of appeals under this section."

11 An appeal lies under Section 260A of the Income Tax Act, only when there is a substantial question of law. We find that there is no question of law involved in this appeal much less any substantial question of law.

12 In Sir Chunilal V. Mehta & Sons Ltd. vs Century Spg. & Mfg. Co. Ltd., reported in AIR 1962 SC 1314, the Supreme Court agreed with and approved a Full Bench Judgment of this Court in Rimmalapudi Subba Rao vs Noony Veeraju And Ors reported in AIR 1951 Mad 969 and laid down the principles for deciding when a question of law becomes a substantial question of law.

13 In Hero Vinoth Vs. Seshammal reported in (2006) 5 SCC 545, the Supreme Court followed Sir Chunilal V. Mehta & Sons (supra) and other judgments and summarized the tests to find out whether a given set of questions of law were mere questions of law or substantial questions of law.

14 The relevant paragraphs of the judgment of the Supreme Court in Hero Vinoth (supra) are set out herein below :

"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 "involving 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] .)

24.The principles relating to Section 100 CPC relevant for this case may be summarised thus :
(i) An inference of fact from the recitals or contents of a document is a question of fact. But the legal effect of the terms of a document is a question of law. Construction of a document involving the application of any principle of law, is also a question of law. Therefore, when

there is misconstruction of a document or wrong application of a principle of law in construing a document, it gives rise to a question of law.
(ii) The High Court should be satisfied that the case involves a substantial question of law, and not a mere question of law. A question of law having a material bearing on the decision of the case (that is, a question, answer to which affects the rights of parties to the suit) will be a substantial question of law, if it is not covered by any specific provisions of law or settled legal principle emerging from binding precedents, and, involves a debatable legal issue. A substantial question of law will also arise in a contrary situation, where the legal position is clear, either on account of express provisions of law or binding precedents, but the court below has decided the matter, either ignoring or acting contrary to such legal principle. In the second type of cases, the substantial question of law arises not because the law is still debatable, but because the decision rendered on a material question, violates the settled position of law .
(iii) The general rule is that High Court will not interfere with the concurrent findings of the courts below. But it is not an absolute rule. Some of the well-recognised exceptions are where (i) the courts below have ignored material evidence or acted on no evidence; (ii) the courts have drawn wrong inferences from proved facts by applying the law erroneously; or (iii) the courts have wrongly cast the burden of proof. When we refer to "decision based on no evidence", it not only refers to cases where there is a total dearth of evidence, but also refers to any case, where the evidence, taken as a whole, is not reasonably capable of supporting the finding."

15 In M.Janardhana Rao Vs. Joint Commissioner of Income Tax [2005 273 ITR 50 (SC)], the Hon'ble Supreme Court held that the principles contemplated under Section 100 of the Code of Civil Procedure would apply to Section 260A of the Income Tax Act too.

16 Right of appeal is not automatic. Right of appeal is conferred by statute. When statute confers a limited right of appeal only in a case which involves substantial questions of law, it is not open for this Court to sit in appeal over the factual findings arrived at by the Appellate Tribunal.

17 We find that there is no substantial question of law involved in this appeal. The appeal is, therefore, not entertained and the same is dismissed. No costs.

s/d-
Assistant Registrar(CS-V)

True Copy

Sub-Assistant Registrar

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To

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

2. The Commissioner of Income Tax, Appeals I, Coimbatore

3. The Joint Commissioner of Income Tax, Non Corporate Range 2
Coimbatore

+1 CC to Ms.T.R. Senthilkumar, Advocate sr 66224.
+1 CC to Ms. Subbaraya Iyyar, Advocate sr 66223.

T.C.A.No.377 of 2017

SP(28/11/2017)