IN THE HIGH COURT OF JUDICATURE AT MADRAS
Dated: 18.04.2017
CORAM
THE HONOURABLE MR. JUSTICE S.MANIKUMAR
and
THE HONOURABLE MR. JUSTICE D.KRISHNAKUMAR

Tax Case Appeal No.356 of 2016

Nitesh Chajjed
.. Appellant/Appellant

Vs.

Income Tax Officer,
Business Ward – IX (1),
611, Anna Salai,
Chennai – 600006. .. Respondent/Respondent

PRAYER: Appeal filed under Section 260-A of the Income Tax Act, 1961 against the order of the Income Tax Appellate Tribunal, "SMC" Bench, Chennai, dated 13.11.2015 passed in I.T.A.No.553/Mds./2015 against the order dated 28.11.2014 made in ITA No.1747/2013-14 on the file of Commissioner of Income Tax (A)-II, Chennai, against Assessment order dated 25.03.2013 passed by Assistant Commissioner of Income Tax, Chennai-6 agaisnt PAN.No.AACPC7264L.

For Appellant : Mr.B.Ramanakumar

For Respondent : Mr.M.Swaminathan,
Standing Counsel for the respondent

JUDGMENT

(Judgment of the Court was delivered by D.KRISHNAKUMAR, J.)

This Appeal has been filed by the assessee against the order of the Income Tax Appellate Tribunal, "SMC" Bench, Chennai, dated 13.11.2015 passed in I.T.A.No.553/Mds./2015.

2. The facts of the case are as follows:-

(i) An information was received from DDIT (Inv), Unit – III (2), Chennai, on 25.11.2009, informing that consequent to survey u/s 133A in the business premises of Smt.Leela Surana, a share sub-broker, it was found that that few assesses had purchased shares from her out of their unaccounted cash. A list containing names of persons along with details of cash received from them were impounded from Smt.Leela Surana. From the documents impounded, it was seen that the appellant herein, assessed to tax, has made cash payments during the Financial Year 2008-09 to Leela Surana for purchase of shares. Subsequently, Smt.Leela Surana had issued bogus contract notes as if the shares were purchased during Financial Year 2007-08. However, no transactions in the contract notes had effected and that those things were done to help the individuals to convert the unaccounted money to accounted money. The assessee/appellant is one of the individuals listed in the investigation report. The appellant had not filed the return of income for the Assessment Year 2009-10. As the income chargeable to tax had escaped assessment, notice under section 148 was issued to the appellant. In response to Notice u/s.148 of the Act, the assessee/appellant filed his return of income on 27.10.2011 admitting total income of Rs.1,68,570/- including agricultural income of Rs.7000/-. Notice u/s.143(2) and 142(1) were issued. The assessee/appellant made objection for reopening of the assessment and the same was rejected by way of proceedings dated 2.11.2012 stating that the re-opening was in accordance with law. Eventually, an order order section 143 (3) r/w 147 of the Income Tax Act was passed on 25.3.2013 making an additional income of Rs.7,10,000/- under the Head "Income from other sources".

(ii) Aggrieved by the same, the appellant preferred an appeal against re-opening of assessment under section 147 of the Act before the Commissioner of Income Tax (Appeals), on the grounds, inter alia, urging to delete the addition of Rs.7,10,000/- as unexplained income under the head "Income from other sources". The appellate authority/Commissioner of Income Tax (Appeals), after hearing the arguments of the authorised representative for the assesseee, held that the appellant admitted before the Assessing Officer that he did not maintain any books of account and further, the Assessing Officer has brought out the fact at Para 6 of his assessment order that there was neither any evidence produced to indicate the purchase of shares in the Financial Year 2007-08 nor any capital gains was admitted by the assessee/appellant. The assessee/appellant had not produced any explanation for source of cash paid of Rs.7,10,000/- by him to Smt.Leela Surana for purchase of shares. From this, it is evident that the cash paid by the assessee of Rs.7,10,000/- is nothing but the unexplained income of the assessee. As such, by order dated 28.11.2014 in ITA No.1747/2013-14, the appellate authority dismissed the Appeal preferred by the assessee/appellant.

(iii) Challenging the aforesaid order, the assessee/appellant preferred an Appeal in I.T.A.No.553/Mds./2015, before the Income Tax Appellate

Tribunal, "SMS" Bench, Chennai, on the grounds, inter alia, that the Commissioner of Income Tax (Appeals) had erred in confirming the order of the Assessing Officer with respect to re-opening of assessment u/s. 147/148 of the Act and that the Commissioner of Income Tax (Appeals) had erred in confirming the order of the Assessing Officer by disallowing a sum of Rs.7,10,000/- as unexplained income under the head "income from other sources". The grounds raised by the assessee/appellant was considered by the Tribunal and as far as the re-opening of assessment is concerned, it has been held that the Assessing Officer has rightly invoked the provisions of sections 147 and 148 of the Act and accordingly, upheld the order of the revenue on this issue. However, with respect to disallowing the sum of Rs.7,10,000/-, as stated above, the Tribunal found that the trial balance of the asseesee dated 31.3.2008 shows that the assessee had invested in the purchase of 4,700 shares of M/s.Shyam Star Gen on 03.4.2007 to establish that the assessee had invested in the shares during the assessment year 2008-09 and the assessee had also produced the contract note issued by Smt.Leela Surana, dated 3.4.2007 to support the same. However, there was no reference about the statement of accounts submitted before the Tribunal by both the revenue authorities in their respective orders. Therefore, the matter was remitted back to the file of the Assessing Officer to examine the veracity of the statement of accounts furnished before the Tribunal and the genuineness of the same and thereafter, pass appropriate order as per law and on merits, vide order dated 13.11.2015 in I.T.A.No.553/Mds./2015. Being not satisfied with the above said order, the assessee has preferred the instant Appeal.

3. Mr.B.Ramanakumar, learned counsel for the appellant would submit that consequent to survey u/s.133A in the business premises of one Smt.Leela Surana, a share broker, in a sworn statement, mentioning the name of the appellant as one of her clients from whom she had allegedly received cash payments for the purchase of shares, proceedings were initiated and Notice u/s.142(1) was issued on 29.07.2011. However, there was no such transaction with the appellant at all. The learned counsel would also submit that that the re-opening of assessment against the assessee only on the basis of an information gathered from a third party by way of sworn statement do not satisfy the ingredients of the Act viz., "reason to believe". Before issuing any notice u/s 148, the assessing officer must have reason to believe that any income chargeable to tax has escaped assessment. Reason to believe can not be a reason to suspect merely. There must be a direct relation between the material coming to the notice of the assessing officer and the formation of the belief that there has been escapement of income of the assessee from assessment in a particular year. The material for formation of belief must be relevant and not vague. The

assessing officer must record reasons in writing before issuing notice u/s 148. Mere a reason recorded that "there is concealment of income' without any specific instance of entries or material relevant to the assessee will not constitute a valid reason as it is vague and general in nature. The next submission of the learned counsel is that while section 142(1) proceedings were pending, another notice u/s.148 was issued on 23.09.2011. Hence, initiating parallel proceedings is not valid in law. He also questioned the validity of the re-opening of assessment under Sections 147/148 on the ground that such provisions cannot be invoked on the basis of information already available. Therefore, in view of the above said grounds, the Tribunal ought to have allowed the appeal filed by the appellant in toto instead of remitting the matter back to the file of the assessing officer. In support of his contention, the learned counsel for the appellant relied on the decision in the case of National Thermal Power Co.Ltd., v. Commissioner of Income Tax reported in (1998) 229 ITR 383 9(SC) : (1999) 157 CTR 249 (SC).

4. Mr.M.Swaminathan, learned standing counsel for the revenue/respondent would submit that the Tribunal has rightly held that the reopening of assessment was in accordance with law and there was no infirmity or illegality therein. The Tribunal has also rightly accepted the contention of the revenue that there was escapement of assessment but to ascertain the veracity of the statement of accounts furnished before the Tribunal and genuineness of the same, the matter was remitted back to the assessing officer and there is no irregularity or infirmity in the order of the Tribunal and the same is liable to be sustained and the instant appeal is liable to be dismissed.

5. Heard the learned counsel appearing for the parties and perused the materials on record.

6. In the grounds of appeal, the appellant has raised the following substantial questions of law:-

> (i) Whether it is right in law to initiate parallel proceedings u/s.148 when proceedings u/s.142(1) is still pending?
>
> (ii) Whether the noting from the Sworn Statement gathered by the department from a third party would satisfy the "reason to believe" clause of sections 148/147 for the re-opening of the Assessment Year of the another Assessee?

(iii) Whether the information available on record based on the information received from a third party, would constitute a valid reason for re-opening under section 148/ 147?

(iv) Whether "calling for records" and "not reasoning them out" would amount to any reason to believe for the purpose of re-opening under sections 148/147?

(v) Whether inter departmental information, without any clear satisfaction of escape of income, based on collaborative evidence constitute a valid reason for re-opening under section 148/147?

7. Point No.(i):- With regard to the first substantial question of law, it is the contention of the appellant that when notice under section 148 of the Income Tax Act was issued, there cannot a parallel proceedings u/s.142(1) of the Income Tax Act, 1961. However, in the affidavit dated 22.06.2016 filed on behalf of the revenue, it is stated that a notice u/s.148 of the Income Tax Act was issued on 23.9.2011 for the assessment year 2009-10 and no notice was issued under section 142(1) of the Income Tax Act for the assessment year 2009-10. The Letter dated 29.07.2011 was a covering letter addressed to the assessee. No notice u/s.142(1) was enclosed for the assessment year 2009-10 and it was only for the assessment year 2010-11. Therefore, the contention of the appellant that there are parallel proceedings - one under section 148 and another under section 142(1) of the Income Tax Act is untenable. It is also pertinent to note that no such ground was raised either before the appellate authority or Income Tax Tribunal.

8. Point Nos.(ii) to (v):- Considering the nature of substantial questions of law Nos.(ii) to (v), they are taken up together for consideration. The contention of the appellant is that the re-opening of assessment against the assessee on the basis of an information gathered from a third party by way of sworn statement do not satisfy the ingredients of the Act viz., "reason to believe". However, reasons recorded by the assessing officer was considered by the appellate authority for re-opening of the assessment and found that there are evidences apart from the sworn statement of Smt.Leela Surana, a share broker, for escapement of assessment. It is an admitted fact that re-opening of assessment against the assessee was within the period of four years from the end of the relevant assessment

year. Therefore, the first proviso of Section 147 will not be applicable to the case of the assesseee. In such circumstances, the assessing officer is empowered to re-open the assessment if he has reasons to believe that the income has escaped from the assessment. It is not required by the revenue to show that income which has escaped assessment was due to the failure on the part of the appellant to disclose fully and truly all the materials relevant to the assessment. Both the appellate authority and the Income Tax Tribunal has found that the assessing officer was empowered to re-open the assessment in the instant case. It is an admitted fact that the assessee had failed to file his return of income for the assessment year 2009-10. Pursuant to the survey conducted under section 133A of the Act in the business premises of Smt.Leela Surana, a Share Sub-Broker, on 25.11.2009, it came to light that the assessee had made cash payments of Rs.6,80,000/- on 17.09.2008 and Rs.30,000/- on 24.9.2008 to Smt. Leela Surana for purchase of shares and had obtained 'back dated' contract note for the purchase of 4,700 share of 'Shyam Star'. Subsequently, the assessee had sold these shares on 17.9.2008 and 24.9.2008 for Rs.6,75,838.61 and 27,378.47 and remitted the sale proceeds to his bank account. Therefore, the assessing officer had the reasons to re-open the assessment of the assessee. Hence, in our view, the Tribunal was justified in assessing the correctness of the notice for reopening the assessment under Section 148 on the basis of the reasons which were disclosed by the Assessing Officer.

9. Reliance was placed by the appellant, on the decision rendered in the case of National Thermal Power Co.Ltd., v. Commissioner of Income Tax reported in (1998) 229 ITR 383 9 (SC) : (1999) 157 CTR 249 (SC) wherein, it has been held in Paragraph 7 as follows:

> 7. The view that the Tribunal is confined only to issues arising out of the appeal before the Commissioner of Income-tax (Appeals) takes too narrow a view of the powers of the Appellate Tribunal [vide, e.g.,C.I.T, v. Anand Prasad [1981] 128 ITR 388 (Delhi), C.I.T. v. Karamchand Premchand P. Ltd. [1969] 74 ITR 254 (Guj) and C.I.T. v. Cellulose Products of India Ltd. [1985] 151 ITR 499 (Guj) [FB]. Undoubtedly, the Tribunal will have the discretion to allow or not to allow a new ground to be raised. But where the Tribunal is only required to consider a question of law arising from the facts which are on record in the assessment proceedings we fail to see why such a question should not be allowed to be

raised when it is necessary to consider that question in order to correctly assess the tax liability of an assessee."

In the aforesaid decision, it has been held that the Tribunal will have the discretion to allow or not to allow a new ground to be raised. In the instant appeal, there is no such question involved. Hence, the aforesaid decision will not be applicable to the facts of the present appeal.

10. Similarly, reliance was placed by the appellant on the decision in the case of Santosh Hazari v. Purushottam Tiwari reported in (2001) 251 ITR 84 (SC) : (2001) 170 CTR 160 (SC), also relied on by the appellant is not applicable to the facts of the present appeal. In that case, the matter was remitted back to the High Court after framing substantial question of law on the ground that no substantial question of law was framed and heard by the High Court. In the instant appeal, It is not the case as if no substantial question of law was framed.

11. However, the ratio laid down in the case of Rimmalapudi Subba Rao v. Noony Veeraju AIR 1951 Mad 969 (FB) of this High Court, it has been held that

> " ... 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 general principles to be applied in determining the question are well settled and the only question was of applying those principles to the particular facts of the case it would not be a substantial question of law."

12. In the light of the aforesaid discussion and decision, we are of the considered view that there is no substance in the questions of law raised and they are answered against the assessee. Hence, we are not inclined to interfere with the order of the Income Tax Appellate Tribunal, "SMC" Bench, Chennai, dated 13.11.2015 passed in I.T.A.No.553/Mds./2015 and the Tax Case Appeal fails and the same is dismissed. No costs. The matter is remitted back to

the Assessing Officer to examine the veracity and genuineness of the statement of accounts furnished before the Income Tax Appellate Tribunal as has been directed by the Tribunal in its order.

Sd/-
Assistant Registrar(CS VI)

//True Copy//

Sub Assistant Registrar

asvm
To

1.Income Tax Officer,
Business Ward - IX (1),
611, Anna Salai,
Chennai - 600006.

2.The Income Tax Appellate Tribunal,
"SMC" Bench, Chennai.

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

4.The Assistant Commissioner of Income Tax,
Chennai-6

+1 cc to Mr.M.Swwaminathan Advocate sr 23894

T.C.A.No.356 of 2016

aa27/06/2017