

* HON'BLE SRI JUSTICE V.RAMASUBRAMANIAN
AND
HON'BLE SMT JUSTICE ANIS

+ **I.T.T.A.Nos.208 and 226 of 2016**

% Date: 06-01-2017

Between:

I.T.T.A.No.208/2016

Between:

Pr. Commissioner of Income Tax-2,
Hyderabad

.....Petitioner

And

Sri G. Mahesh Babu,
Flat No.203, Hall Mark Hill View,
Journalists Colony, Jubilee Hills,
Hyderabad

..... Respondent

I.T.T.A.No.226/2016

Between:

Sri G. Mahesh Babu,
Flat No.203, Hall Mark Hill View,
Journalists Colony, Jubilee Hills,
Hyderabad

.....Petitioner

! Counsel for the Appellant : Ms. K. Mamta Choudary

^ Counsel for the Respondent : Mr. R. Sivaraman representing
Mr. N. Viay

< GIST:

> HEAD NOTE:

? Cases referred

**IN THE HIGH COURT OF JUDICATURE AT HYDERBAD
FOR THE STATE OF TELANGANA AND THE STATE OF
ANDHRA PRADERSH**

Delivered on: 06.01.2017

**HON'BLE SRI JUSTICE V.RAMASUBRAMANIAN
AND
HON'BLE SMT JUSTICE ANIS**

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Counsel for the appellant : Ms. K. Mamta Choudary

Counsel for the respondent : Mr. R. Sivaraman representing
Mr. N. Viay

HON'BLE SRI JUSTICE V.RAMASUBRAMANIAN
AND
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I.T.T.A.Nos.208 and 226 of 2016

JUDGMENT: (per Hon'ble Sri Justice V. Ramasubramanian)

Both the appeals, one filed by the Revenue and another filed by the assessee arise out of an order passed by the Income Tax Appellate Tribunal, in a batch of about 10 appeals, 6 by the assessee and 4 by the Revenue. But both the appeals on hand relate only to one of those 10 appeals in I.T.T.A.No.55/HYD/2015, which relates to the Assessment Year 2009-10.

2. We have heard Ms. K. Mamta Choudary, learned Senior Standing Counsel for I.T. Department and Mr. R. Sivaraman, learned Counsel representing Mr. N. Vijay for the Assessee.

3. The assessee is an individual belonging to the tinsel world. He filed his return of income for the Assessment Year 2009-10 on 30.09.2009 admitting an income of Rs.3,16,76,600/-, besides an agricultural income. The case was selected for scrutiny and a notice under Section 143 (2) and 142 (1) was issued on 6.11.2013.

4. The Assessing Officer completed the assessment under Section 143 (3) r/w Section 153A and made certain additions including the addition of the alleged unexplained investments to the tune of Rs.1,99,22,000/- under Section 69B. This addition was on the ground that the assessee and his wife entered into an agreement with M/s. Emaar Hills Township (P) Ltd., for the purchase of a plot during the relevant Assessment Year, for a stated price of Rs.5000/-

per square yard, but the actual payment made was to the tune of Rs.40,000/- to Rs.45,000/- per square yard. The information about such payment was passed on by the Central bureau of Investigation, on the basis of the raids conducted by them. The Assessing Officer placed reliance upon a statement given by one Tummala Ranga Rao under Section 164 Cr.P.C., before the Metropolitan Magistrate-II, Hyderabad, as well as before the Assessing Officer of M/s. Emaar Hills Township (P) Ltd.

5. The Assessee filed an appeal before the C.I.T. Appeals. But the same was rejected and hence the assessee filed an appeal in I.T.T.A.No.55/HYD/2015. The Tribunal accepted the contention of the assessee that the Assessing Officer had utilised the material gathered as a result of an investigation conducted without the knowledge of the assessee and that the assessee ought to have been given an opportunity to cross-examine the deponent. In view of the said finding that there was violation of principles of natural justice, the Tribunal remanded the matter back to the Assessing Officer to provide an opportunity to the assessee.

6. Though the Revenue is not wholly unhappy about the order of assessment, the department is aggrieved by one observation contained in the order of the Tribunal to the effect that no addition can be made without a direct evidence linking the assessee to the cash payments. Therefore, the department has come up with the appeal in I.T.T.A.No.208 of 2016.

7. The assessee has come up with the appeal I.T.T.A.No.226 of 2016 contending that once the order of the Assessing Officer as

confirmed by the C.I.T. Appeals is found to be vitiated by non-observance of principles of natural justice, the order of assessment was *void abinitio* and there was no question of remanding the matter back.

8. The questions of law raised by the Revenue in their memorandum of appeal I.T.T.A.No.208 of 2016 are as follows:

1. Whether in the facts and circumstances of the case and in law, the Hon'ble ITAT is justified in accepting the plea of the assessee that no opportunity of cross examination was given to the assessee without considering the order sheet notings dated 14.03.2014 & 24.03.2014?
2. Whether in the facts and circumstances of the case and in law, the Hon'ble ITAT is justified in directing the Assessing Officer that no addition can be made if there is no evidence available directly linking the assessee towards payment of on-money, without considering the evidence in its totality?
3. Whether in the facts and circumstances of the case and in law, the Hon'ble ITAT is justified in remanding the matter on the basis of availability of substantial evidence while simultaneously directing that no addition can be made without evidence directly linking the assessee to the payment of on-money?

9. The questions of law raised by the assessee in their memorandum of appeal I.T.T.A.No.226 of 2016 are as follows:

1. Whether on the facts and in the circumstances of the case, the Appellate Tribunal is right in law in holding that the assessment in the present case for the assessment year 2009-10 is not void-ab-initio even though there is a gross violation of principles of natural justice by not allowing any opportunity for cross-examining the person whose statement formed the basis of addition under Section 69-B of the Act?
2. Whether on the facts and in the circumstances of the case, the Appellate Tribunal is right in law in remitting the issue relating to payment of on-money to the file of the Assessing Officer, even though it had observed that principles of natural justice is not followed and cross-examination is also not offered to the appellant?
3. Whether on the facts and in the circumstances of the case, the Appellate Tribunal is right in law in remitting the issue relating to payment of on-money even though it had given a factual finding that the assessing officer did not have any other materials to establish that the appellant had paid such on-money in the present case and thereby giving an opportunity to the assessing officer to re-open the entire issue again?
4. Whether on the facts and in the circumstances of the case, can an addition be made under Section 69 of the Act merely based on the evidence of the seller of the appellant and the Tribunal having regard to the law laid down by the Hon'ble Supreme Court in P.V.

Kalayanasundaram case, ought not to have remitted the issue before the assessing officer?

10. Though both the parties have multiplied the questions of law, with a mere jugglery of words, there are actually only two substantial questions of law that arise for consideration. They are –

1. Whether an order of assessment passed on the basis of the material gathered behind the back of the assessee and not supplied to the assessee with an opportunity to rebut the same, would be void abinitio, incapable of being rectified through an order of remand?
2. Whether the Tribunal was justified, in the facts and circumstances of the case, in directing the Assessing Officer upon remand not to make any addition in the absence of any evidence directly linking the assessee towards the payment of on-money?

Question No.1

11. The answer to the first question of law is not very difficult to be found. The very case of the assessee both before the C.I.T Appeals and before the Income Tax Appellate Tribunal was that on the basis of a statement recorded from one Ranga Rao behind the back of the assessee, the order of assessment came to be passed without supplying the copy of the statement or giving an opportunity to the assessee to cross-examine the said Ranga Rao. Therefore, the case was clearly one of violation of the principles of natural justice.

12. The law is very clear that whenever an order is vitiated for non-compliance with the principles of natural justice, the order should be set aside and the matter remitted back to the same

authority. It is only in cases where the original authority had lost its jurisdiction in the meantime, an order of remand cannot be passed.

13. The powers of the Income Tax Appellate Tribunal to pass an order of remand are not in doubt nor in dispute. Therefore, the contention that an order of assessment passed in violation of the principles of natural justice is void abinitio, is completely contrary to the fundamental principles of law, especially when the original authority had not lost its jurisdiction so as to become ineligible to deal with the issue after remand. Therefore, the first question of law is answered against the assessee. As a consequence, the appeal I.T.T.A.No.226 of 2016 is dismissed.

Question No.2

14. Insofar as the second question of law is concerned, the same arises only in the appeal filed by the Revenue. Both the Assessing Officer and the C.I.T. Appeals relied upon two statements given by one Tummala Ranga Rao, one before the Metropolitan Magistrate and another before the Assessing officer. While remanding the matter back to the Assessing Officer, the Tribunal held in para-24 of its decision as follows:

“If the Assessing Officer is able to establish on the basis of evidence gathered that the assessee has paid on-money to the extent quantified by him, then he can make the addition under Section 69B. On the flip side, if there is no evidence available on record to directly link the assessee towards payment of on-money, then merely on the basis of the fact that some other buyers have accepted payment of on-money, no addition can be made.”

15. The objection of the department to the above finding is that in cases of this nature there can be no evidence to directly link

the assessee with payment of on-money and that therefore the finding of the Tribunal almost destroyed the case of the Revenue.

16. But we do not think so. The Tribunal has carefully used the word “on the flip side”, in the portion extracted above. Therefore it cannot be taken to be a dictate to the Assessing Officer to decide the case in a particular manner.

17. As a matter of fact, the department has failed to appreciate one thing. The evidence for the payment of on-money, over and above what is indicated in the documents, may arise in two different methods. It may arise on the basis of the recipient of on-money giving a statement to the effect. Alternatively it may arise circumstantially on the basis of the payments made by all other purchasers in the very same project.

18. The case of the assessee is alleged to fall under the second category. This is not a case where the company M/s. Emaar Hills Township (P) Ltd., has admitted to have received any on-money from the assessee. This is a case where other persons, who bought the property from the very same company, had allegedly paid huge amounts for the purchase of the property. These statements may indicate three things, viz., (1) that the assessee also might have paid the very same rate; or (2) that the assessee was conferred with the special privilege of a reduced rate, which may attract other provisions of the Act; or (3) that the market value of the property purchased by the assessee was not the same as indicated in the title documents. When the Assessing Officer is left with the option of examining all these three alternatives, it is not correct on

the part of the department to think that the fate of the assessment is now sealed. Hence the second question of law is answered accordingly and the appeal I.T.T.A.No.208 of 2016 is disposed of.

19. In fine I.T.T.A.No.208 of 2016 and I.T.T.A.No.226 of 2016 are disposed of in terms of the answers to the substantial questions of law indicated above. There shall be no order as to costs.

20. As a sequel pending miscellaneous petitions, if any, shall stand closed.

V. RAMASUBRAMANIAN, J

ANIS, J

Date:6.01.2017
Js

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