IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 30.10.2018

CORAM :

THE HONOURABLE MR.JUSTICE T.S.SIVAGNANAM
and
THE HONOURABLE MRS.JUSTICE V.BHAVANI SUBBAROYAN

Tax Case Appeal Nos.1091 and 1092 of 2008

Commissioner of Income Tax,
Chennai .... Appellant in both appeals

vs.

Shri S.Ramabadran .... Respondent in both appeals

Tax Case Appeals filed under Section 260A of the Income Tax Act, 1961 against the order of the Income Tax Appellate Tribunal Madras 'C' Bench, dated 30.11.2007 in IT(SS)A No.134/Mds/2006 and IT(SS)A No.151/Mds/2006, respectively, for the block period 1.4.1995 to 20.02.2002.

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For Appellant : Mrs.R.Hemalatha
Sr.Standing Counsel

For Respondent : Mr.A.S.Sriraman

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COMMON JUDGMENT

[Judgement of the Court was delivered by T.S.Sivagnanam, J.]

These appeals, filed by the Revenue under Section 260-A of the Income Tax Act, 1961 (the 'Act' for brevity), are directed against the common order passed by the Income Tax Appellate Tribunal, Madras-C Bench (the 'Tribunal' for brevity) in I.T.A.(SS)A.No.134/Mds/2006 and ITA(SS)A.No.151/2006, for the block assessment period 01.04.1995 to 20.02.2002.

2.These Appeals have been admitted on 01.08.2008, on the following Substantial Question of Law:

> "Whether in the facts and circumstances of the case, the Tribunal was right in deleting the undisclosed income admitted by the assessee in his sworn statement recorded u/s.132(4), and once again reiterated in a letter sent to the ADIT about three weeks thereafter on the ground that the assessee had retracted statement, when such retraction was after two years?"

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3.A search was conducted in the case of the assessee on 20.02.2002, consequent to which, an assessment under Section 158BC of the Act was framed, wherein, the Assessing Officer made an addition of Rs.1,37,60,050/- being the amount found to be recorded as share application money in the books of Akshaya Finance Limited; Rs.34,92,500/- being the amount of share capital invested in Heathrow Investments Pvt.Ltd., stated to be in false names and a sum of Rs.3,50,000/- being the investment in Lara Holdings Pvt Limited in the names of Uma and Kannan, which was challenged before the Commissioner of Income Tax (Appeals), who upheld the order of the Assessing Officer on the issue of share application money in Akshaya Finance Ltd., but deleted the additions made with regard to the investments in the two companies. Aggrieved by the order passed by the CIT(A), the assessee and the Revenue both filed appeals to the Tribunal. The Tribunal deleted the additions on account of the share application money on the ground that the Akshaya Finance Limited has been filing return of income from 1996-97 onwards and on the other two investments also and accordingly decided the issue in favour of the assessee, by upholding that portion of the order passed by the CIT(A). Aggrieved by the same, the Revenue is on appeal before us, by way of these appeals.

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4.We have heard Mrs.R.Hemalatha, the learned Senior Standing Counsel for the appellant/Revenue and Mr.A.Sriraman, the learned counsel appearing for the Respondent/assessee.

5.The Assessing Officer, while completing the assessment for the block period in question, vide order dated 29.04.2004, dealt with various issues and in these appeals we are only concerned with the issue of share capital investment in companies. This was dealt with by the Assessing Officer in Paragraph No.7 of the Assessment Order. The Assessing Officer stated that during the course of search in the premises, the assessee had made a statement under Section 132(4) of the Act declaring various amounts totalling to Rs.199 lakhs as his undisclosed income. These three amounts represented share capital investments in three companies, wherein, the assessee was a Director/Promoter. The share capital in Akshaya Finance Ltd., to the tune of Rs.1,37,60,050/-, in Lara Holding Pvt. Ltd., to the tune of Rs.3,50,000/- and in Heathrow Investments Pvt. Ltd., to the tune of Rs.34,92,500/- were disclosed by the assessee as the amounts in his hands. The Assessing Officer noted the contentions raised by the assessee, but ultimately held that the statement, which was recorded

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from the assessee under Section 132(4) of the Act, could not have been retracted, that too, after a period of two years, more so, when the assessee himself had sent a letter subsequently and the said investments have to be treated as undisclosed income for the block period and accordingly assessed the same. The CITA considered the statement given by the assessee under Section 132(4) of the Act and taking note of certain documents, which were in fact submitted by the assessee, upheld the order of the Assessing Officer with regard to the investment in Akshaya Finance Ltd., as undisclosed income of the assessee and confirmed the addition made by the Assessing Officer. The Tribunal, after taking note of the statement obtained from the assessee under Section 132(4) of the Act held that merely because the assessee has given a statement that cannot be considered as the basis for addition, as there was no seized material relating to the finding that the money actually belongs to the assessee. The Tribunal further held that the sworn statement recorded under Section 132(4) is some piece of evidence. However, the Assessing Officer has to establish the link with other books of accounts seized and it cannot be considered as a conclusive evidence. Interpreting the words 'may be presumed', appearing in Section 132(4) of the Act, the Tribunal held that these words give the option to the authorities concerned to presume the

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things and it is rebuttable and it does not give definite authority and not a conclusive one. Therefore, it held that the authorities concerned should draw the conclusion judicially, depending upon the facts and circumstances of the case, as there is no conclusive presumption based on such statement given by the assessee. Further, the Tribunal pointed out that the Assessing Officer cannot draw inference on the basis of suspicion, conjectures or surmises. Suspicion however strong cannot take the place of material in support of the findings of the Assessing Officer. After going through the documents, more particularly, the returns filed by Akshaya Finance Ltd., from the year 1996-97 onwards, the Tribunal held that the transaction cannot be considered as undisclosed income, since it has been disclosed by M/s.Akshaya Finance Ltd., to the Department. Further, the Tribunal referred to the other documents, which were placed by the assessee, viz., the Memorandum of Association of Akshaya Finance Ltd., Details of Form-II filed before the Registrar of Companies, Annual returns filed before the Registrar of Companies and ultimately held that the addition cannot be made on the said ground in the hands of the assessee as undisclosed income, since the Department has not produced any evidence to show that the assessee has invested the money. Accordingly, the said addition is deleted.

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6.The Hon'ble Supreme Court, in the case of **Assistant Commissioner of Income Tax, Chennai, vs. A.R.Enterprises [(2013) 350 ITR 489 (SC)]**, considered the question whether payment of Advance Tax by the assessee would by itself tantamount to disclosure of income for the relevant assessment year and whether such income can be treated as undisclosed income for the purpose of application of Chapter XIV-B of the Act and while answering the said question, the Hon'ble Supreme Court has held as follows:

> *"18.The genesis of the issue before us lies within the folds of this section. Sections 158BD and 158BC, along with the rest of Chapter XIV-B, find application only in the event of discovery of "undisclosed income" of an assessee. Undisclosed income is defined by Section 158B as that income "which has not been or would not have been disclosed for the purposes of this Act". The legislature has chosen to define "undisclosed income" in terms of income not disclosed, without providing any definition of "disclosure" of income in the first place. We are of the view that the only way of disclosing income, on the part of an "undisclosed income" signifies income not stated*

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in the return filed. Keeping that in mind, it seems that the legislature has clearly carved out two scenarios for income to be deemed as undisclosed: (i) where the income would not have been disclosed. If a situation is covered by any of the two, income would be undisclosed in the eyes of the Acct and hence subject to the machinery provisions of Chapter XIVB. The second category, viz. Where income would not have been disclosed, contemplates the likelihood of disclosure; it is a presumption of the intention of the assessee since in concluding that an assessee would or would not have disclosed income, one is ipso facto making a statement with respect to whether or not the assessee possessed the intention to do the same. To gauge this, however, reliance must be placed on the surrounding facts and circumstances of the case."

7.In terms of the law laid down in the aforementioned decision, for income to be an 'undisclosed income', there are two scenarios, viz., (i)where income has clearly not been disclosed and (ii)where the income would not have been disclosed.

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8.The learned counsel for the Revenue sought to advance submissions by referring to Section 68 of the Income Tax Act (the 'Act' for brevity), which deals with 'cash credit'. In our considered opinion Section 68 of the Act can have no application to the facts of the case, because the said Section would apply where any sum is found credited in the books of an assessee maintained for any previous year, and the assessee offers no explanation about the nature and source thereof or the explanation offered by him is not, in the opinion of the Assessing Officer, satisfactory, the sum so credited may be charged to income tax as the income of the assessee on that previous year.

9.Firstly, in the assessee's case, the said sum is not found credited in the books of accounts of the assessee nor it is maintained for any previous year. Therefore, Section 68 of the Act has no application. Consequently, the reliance placed on the first Proviso to Section 68 of the Act, by the Revenue, is not well founded. Furthermore, the first Proviso to Section 68 of the Act was inserted only by Finance Act, 2012 with effect from 01.04.2013. Therefore, the stand taken by the Revenue, by referring to Section 68 of the Act, is not tenable.

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10.The Revenue's contention is that the statement was recorded under Section 132(4) of the Act from the assessee, which was also later confirmed by the assessee by way of letter and the retraction, after about a period of two years, is an afterthought and therefore, the Assessing Officer has rightly rejected such retraction and made the addition.

11.We have gone through the statement, which has been recorded from the assessee, which has also been referred to in the Assessment Order and from the statement, we find that it is not an unequivocal or a candid admission, but we find that the statement is an explanation given by the assessee with regard to his investments. The relevant portion of the statement reads as follows:

> "*This disclosure represents the share capital shown in the name of M/s.Amicable Finance Ltd in the balance sheet of M/s.Akshara Finance Ltd. The said sum of Rs. 1,37,60,000/- was invested by M/s.Amicable Finance Ltd (OCB) from December 1995 to April 1996 by Account Payee Cheque and after obtaining approval of Reserve Bank of India. Even the shares were allotted to M/s Amicable Finance Ltd at the rate of Rs.10 per share.*

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M/s.Amicable Finance Ltd was dissolved in the month of April/May 2001 so they have transferred their entire holdings in M/s.Akshara Finance Ltd to us at the rate of 25 paise per share. Since, M/s.Amicable Finance Ltd., is already dissolved so I am not in a position to submit the confirmation to the satisfaction of the department in respect of amount invested by them as share capital during the period from December 95 to April 96 and keeping in view the same and to buy peace with the department I am offering the said sum of Rs. 1,37,60,000/- as my undisclosed income, though the same was invested by M/s.Amicable Finance Ltd., through proper banking channels in India with approval of Reserve Bank of India."

12.It is no doubt true that in the above statement the assessee has stated that to buy peace with the Department, he was offering a sum of Rs.1,37,60,000/- as his undisclosed income. But he qualifies the statement by stating that the said sum was invested by M/s.Amicable Finance Ltd., through proper banking channels in India with the approval of Reserve Bank of India. Therefore, in our considered view, the statement is not an admission, but an explanation

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being offered in respect of the said investment and even while stating that the assessee is ready and willing to offer a particular sum as undisclosed income, still the assessee qualifies the statement stating that he is doing so in spite of the fact that the amount was invested by Amicable Finance Ltd., through proper banking channels in India with the approval of Reserve Bank of India. Therefore, in our considered view, the Revenue is not justified in stating that the assessee has subsequently retracted the statement given by him at the first instance while he participated in the assessment proceedings.

13.Mrs.R.Hemalatha, the learned Senior Standing Counsel, placed reliance on the decision of the Hon'ble Division Bench of this Court in the case of **K.Sakthivel vs. The Assistant Commissioner of Income Tax, Central Circle 1, Coimbatore [(2012) 26 taxmann.com 35 (Madras).**

14.We have gone through the facts of the said case and we find that the said decision is wholly inapplicable to the facts and circumstances of the case on hand. The stand taken by the assessee therein was that the statement recorded in the year 1999, was not recorded in the presence of the Deputy Director of Income Tax

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(Investigation) and it was not given voluntarily. Considering the nature of retraction, the Division Bench held that the retraction is an afterthought.

15.Mrs.R.Hemalatha, the learned Senior Standing counsel placed reliance on the **decision of the High Court of Punjab and Haryana in the case of Commissioner of Income-tax vs. Lekh Raj Dhunna [(2012) 20 taxmann.com 554(Punjab & Haryana)** to support her submission that the retraction should not be permitted and the Tribunal fell in error in deleting the addition made by the Assessing Officer.

16.In the case of **Lekh Raj Dhunna(supra)** the Court found that no plausible explanation has been furnished as to why the statement given by the assesee could not be withdrawn earlier. Therefore, the Court was concerned about the time when the retraction was made by the assessee and the assessee did not retract it at the earliest point of time, nor he gave proper explanation for having not been able to do so at the earliest point of time. Therefore, we are of the considered view that the said decision cannot be applied to the assessee's case.

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17.Mrs.R.Hemalatha, the learned Senior Standing Counsel would further argue that merely because the transactions were through proper banking channels, that by itself will not establish the genuineness of the transactions. In support of her contention, reliance was placed on the decision of the Hoin'ble Division Bench of this Court in the case of **Sri Mangilal Jain vs. The Income Tax Officer, Ward I(2), Kumbakonam, in TC(Appal) No.376/04, dated 16.6.2009**. The question which fell for consideration in the said case was whether the Tribunal was right in sustaining the order passed by the Respondent/Assessing Officer in rejecting the explanation offered for the credit entry pertaining to a particular person and consequential addition with interest, while determining the taxable total income for the relevant year.

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18.After analying the factual position in the said case and finding that the identity of the creditor and the credit worthiness and genuineness of the transaction having not been established, the Court held that merely because the transaction was given by cheque, it will not prove the genuineness.

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19.The said decision of the Division Bench of this Court can in no manner advance the case of the Revenue, as in the instant case the transactions were done about seven years before the search operations were conducted. From the period 1995 to 2002, the assessee has been filing income tax returns and the transactions have been shown and well within the knowledge of the Department. Apart from that the transactions have been approved by the Reserve Bank of India and also reported in the returns filed before the Registrar of Companies.

20.Mr.S.Sriraman, the learned Counsel for the respondent/assessee placed before us the paper book containing all the documents which were placed before the Assessing Officer, the CITA as well as the Tribunal. On a perusal of these documents, we find that the assessee has been able to establish as to how the transactions had taken place, how the remittances were done, the approval is given by the Reserve Bank of India and the returns filed before the Registrar of Companies. Furthermore, we find that the assessment in respect of M/s.Akshaya Finance Ltd., was completed under section 143(3) of the Act and such assessment orders for the assessment years 1997-98, 1998-99, 1999-2000 and 2002-03 have been placed in the paper

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book. Thus, on a cumulative consideration of the entire materials placed before us, we are fully satisfied that the Tribunal was justified in deleting the addition made on the ground that the transaction cannot be considered as an undisclosed transaction.

21.Thus, for the above reasons, we find that the Revenue has not made out any good ground to interfere with the order passed by the Tribunal. Accordingly, the appeals fail and the same are dismissed. The Substantial Question of Law is answered against the Revenue. No costs.

(T.S.S.J.) (V.B.S.J.)
30.10.2018

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Index:yes/No

To

The Income Tax Appellate Tribunal Madras 'C' Bench.

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T.S.SIVAGNANAM,J.
and
V.BHAVANI SUBBAROYAN,J.

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