IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 23.10.2018

CORAM

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

Tax Case (Appeal) No.1222 of 2008

The Tirupur Consumers Co-operative
Wholesale Stores Limited,
No.1, Perumanallur Road,
Tirupur-641 602 ... Appellant

vs.

The Deputy Commissioner
of Income Tax,
Special Range-II,
Coimbatore-641 018 ... Respondent

Tax Case Appeal filed under Section 260-A of the Income Tax Act, 1961 against the order of the Income-Tax Appellate Tribunal, Chennai "D" Bench, dated 30.08.2005 in ITA No.587/Mds/2002, for the assessment year 1992-93.

For Appellant : Mr.M.P.Senthil Kumar

For Respondent : Mrs.K.G.Usharani for
Mr.T.R.Senthilkumar

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JUDGMENT

[Delivered by T.S.Sivagnanam, J.]

This appeal by the assessee is directed against the order passed by the Income Tax Appellate Tribunal, Chennai “D” Bench (the 'Tribunal' for brevity), in ITA No.587/Mds/2002, for the assessment year 1992-93.

2.The Appeal has been admitted, vide order dated 14.08.2008, on the following Substantial Questions of Law:

> *“1.Whether on the facts and in the circumstances of the case, the Income Tax Appellate Tribunal was right in holding that the levy of interest under Section 234A and 234B of the Income Tax Act, 1961 are valid?*
>
> *2.Whether on the facts and in the circumstances of the case, the Income Tax Appellate Tribunal was right in upholding the levy of interest under Section 234A and 234B of the Income Tax Act, 1961 upto the date of completion of assessment under Section 143(1) on 25.03.1997, when the return was filed on 02.09.1994?*

3.Whether on the facts and in the circumstances of the case, the Income Teax Appellate Tribunal was right in not entertaining the additional grounds challenging the order u/s.143(1) purely on the legal issue of limitation which goes into the jurisdictional foundation on which the Assessing Officer passed the order?

4.Whether on the facts and in the circumstances of the case, the Income Tax Appellate Tribunal was right in not holding that the assessment u/s.143(1) is barred by limitation and therefore, intimation dated 25.3.1997 void ab initio?"

3.We have heard Mr.M.P.Senthil Kumar, the learned counsel for the appellant/assessee and Mrs.K.G.Usharani for Mr.T.R.Senthilkumar, the learned Counsel for the respondent/Revenue.

4.The Tribunal, by the impugned order dismissed two appeals filed by the assessee, one for the assessment year 1991-92 and other for the assessment year 1992-93, which is on appeal before us. In respect of the order passed for the assessment year 1991-92, the assessee filed a separate appeal in TCA No.1971/06, which was heard by a Hon'ble Division Bench of this Court and identical Substantial Questions of Law, which were framed for consideration, were rejected by judgement dated 25.09.2012. The operative portion of the judgement reads as follows:

> *"4.The Tribunal considered the main contention of the assessee as regards the levy of interest and held that the order levying interest was rightly in accordance with law, hence no interference was called for. As regards the additional grounds raised, the Tribunal held that the assessee had not raised the same before the first Appellate Authority and it was a belated claim made on a question, which is a mixed question of law and facts. Following the decision reported in* ***229 ITR 383 (SC) (National Thermal Power Corporation V.CIT)****, the Tribunal rejected the additional grounds. Aggrieved by this, the present Tax Case (Appeal) has been filed by the assessee.*
>
> *5.Learned counsel appearing for the assessee pointed out that when the question raised by the assessee goes to the root of the matter regarding the assumption of jurisdiction, the Tribunal should have considered the claim of the assessee and entertain through the additional*

grounds raised. In this connection, he placed reliance on the decision reported in ***(2003) 260 ITR 84 (Commissioner of Income-Tax V. Gujarat Electricity Board)****.*

6. A perusal of the above-said decision shows that the Officer issued notice for regular assessment under Section 143(2) of the Income Tax Act. After issuance of notice under Section 143(2), the Officer issued notice of intimation under Section 143(1)(a) after issuance of notice under Section 143(2). The Supreme Court held that once regular assessment proceedings was commenced, there could be no reference of the Officer to assume jurisdiction under Section 143(1)(a).

7. We do not find that this case would be of any assistance to the assessee for the reason that the assessee is well aware of the fact that the assessment made herein was in terms of Section 147 of the Income Tax Act. Admittedly, after receipt of the notice under Section 142(1) on 14.02.1997, the assessee had filed its reply along with the return, which is a repetition of the belated return filed on 30.09.1993. Then the admitted factual position is that there was no original assessment and that the one and only original assessment made was on the basis of the *return of income on escaped income. Issuance of notice under Section 142(1) or 143(2) being a matter of procedure made under Section 147 of the Income Tax Act, under Section 147, the one and only return filed was the one filed on 27.2.1997, the inference that flows therefrom is that there had been a belated filing of return and payment of advance tax attracting penal interest under Section 234A, 234B and 234C of the Income Tax Act. The mere reference to a wrong provision of law, per se, would not in any manner make the assessment as one of an intimation ignoring the notice, which was served on the assessee pursuant to Section 147 of the Income Tax Act.*

8. As rightly pointed out by the learned Standing Counsel appearing for the Revenue, the principle is well established that the exercise of power would be referable to a jurisdiction which confers validity upon the authority and not to the jurisdiction under which it would be nugatory and there was no reason to exclude the application of this rule to judicial proceedings – vide ***AIR 1989 1602 (Kamala Devi Budhia & Ors. V. Ram Prabha Ganguli & Ors.).*** *Thus ''if the power can be traced to a valid power, the fact that the power is purported to have been exercised under* *a non-existing power does not invalidate the exercise of the power'' -* ***vide (1977) 1 SCR 1022 (M.R.Sigh V. The Chief Commissioner (Admn.) Manipur and others)***

9.In the light of the decision of the Apex Court, with the knowledge of the proceedings are only under Section 147 of the Income Tax Act, we do not find any justifiable ground to accept the plea of the assessee. Consequently, the Tax Case (Appeal) fails.

10. As far as the contention raised by the assessee that the Tribunal had not exercised his jurisdiction to entertain the additional ground is concerned, even if the Tribunal is to be directed to entertain such a ground, the decision is not going to make any difference to the case pleaded by the assessee. Accordingly, all the questions of law stand rejected and this Tax Case (Appeal) stands dismissed. No costs. Consequently, TCMP No.1799 of 2006 is also dismissed."

5.Mr.M.P.Senthilkumar, the learned counsel for the assessee, sought to canvas certain grounds contending that the decision rendered by the Division Bench of this Court, dated 25.09.2012, requires to be reconsidered.

6.Such an oral prayer cannot be made, more particularly, even the said judgement has attained finality. Apart from that the order impugned before this Court as well as in the earlier appeal was a common order. Therefore, we respectfully follow the judgement of the Division Bench of this Court, dated 25.09.2012. Accordingly, the appeal filed by the assessee is dismissed and the Substantial Questions of Law stand rejected. No costs.

(T.S.S.J.) **(V.B.S.J.)**
23.10.2018

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Index:Yes/No

To

1.The Income-Tax Appellate Tribunal, Chennai "D" Bench.
Madras.

T.S.Sivagnanam, J.
and
V.Bhavani Subbaroyan, J.

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T.C. (Appeal) No.1222 of 2008

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