

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON 20.06.2017

DATE OF JUDGMENT : 14.06.2018

CORAM :

The Hon'ble Ms.INDIRA BANERJEE, CHIEF JUSTICE

AND

The Hon'ble Mr.JUSTICE M.SUNDAR

Tax Case Appeal No.239 of 2017

Principal Commissioner of Income Tax
Central 2,
No.108, Mahatma Gandhi Road,
Chennai-600 034.

.. Appellant

Vs.

Trisha Krishnan

.. Respondent

Tax Case Appeal is preferred under Section 260A of the Income Tax Act, 1961 against the order of the Income Tax Appellate Tribunal, Madras 'B' Bench, dated 6th September, 2016 in ITA No.1009/Mds/2016.

Against the order dated 20.01.2016 passed by the commissioner of Income Tax (Appeal) 18 Chennai and made in CIT (Appeals) order in ITA No.775/15-16 and against order dated 24.09.2013 passed by the Deputy Commissioner of Income Tax Central Circle 11(5) Chennai and made in P.A.No.ACDPT8973C in the Assessment Year of 2010-11 and against the assessment order dated 11.03.2013 passed by the Assistant Commissioner of Income Tax Central Circle II (5) and made in ACDPT8973C in assessment year of 2010-11.

For Appellant : Mr.T.R.Senthil Kumar

For Respondent : Mr.M.P.Senthil Kumar

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JUDGMENT

M.SUNDAR, J.

This is a Tax Case Appeal assailing an order of the Income Tax Appellate Tribunal, 'B' Bench, Chennai. The facts that are essential for appreciating our order are set out infra under the caption 'Factual Matrix'.

2 FACTUAL MATRIX :

2(a) The Assessee in the instant case is a Cine artist and she is also into modeling. Assessee is the sole respondent in this Tax Case Appeal (hereinafter referred to as 'TCA' for brevity) before us. The sole respondent shall be referred to as 'Assessee' for the sake of convenience and clarity. The Principal Commissioner of Income Tax, Central 2 is the appellant in this TCA and the appellant shall be referred to as 'Revenue' also for the sake of convenience and clarity. The assessment year which is subject matter of this TCA is 2010-2011 (hereinafter referred to as the 'said assessment year' for the sake of clarity and convenience).

2(b) The Assessee, who is an individual filed her return of income for the said assessment year on 25.9.2010, declaring an income of Rs.89,69,894/-. Subsequently, the Assessee filed a revised return on 30.03.2012 admitting a total income of Rs.4,41,40,950/-. As is evident from the numbers, the difference between the income originally declared on 25.9.2010 and the total income admitted in the revised return filed on 30.03.2012 is Rs.3,51,71,053/-. It is not in dispute before us that this entire differential sum is the advance received by the Assessee in the said assessment year from various cinema producers towards the work to be done by her. In the original return filed, the advances received by the assessee had not been shown as income in the said assessment year, though the same have been set out in the balance sheet filed by her with the Revenue. This 'advance not being shown as income in the same assessment year' issue is the first aspect of the matter.

2(c) Thereafter an assessment order was made by the Assessing Officer (hereinafter referred to as 'AO' for the sake of brevity) on 11.3.2013. In the assessment order, the AO has noticed that the Assessee had incurred expenses towards (a) Audit fees, (b) Commission and brokerage, (c) Professional charges and (d) security charges, for which Tax Deduction at Source (hereinafter referred to as 'TDS' for brevity) has been made, but no proof of remittance of the same into the Government account was produced. On this ground, as the proof for deduction of tax and remittance into the Central Government account with regard to the above said four heads of expenditure had not been produced, the AO disallowed and added to the total income the said sum (Rs.24,05,062/-) under Section 40(a)(ia) of the Income Tax Act, 1961 (hereinafter referred to as 'IT Act' for the sake of brevity). This disallowance qua TDS is the second aspect of

the matter.

2(d) With regard to the above two aspects of the matter, namely, advances not shown as income in the said assessment year and the disallowance on account of no proof for deduction and remittance of TDS, penalty proceedings were initiated and the Revenue, by an order dated 24.9.2013, imposed a penalty of Rs.1,16,11,020/- under Section 271(1)(c) of the IT Act. This sum was arrived at by the Revenue by computing penalty at 100% of tax payable on what according to the Revenue is the concealed income. What the Revenue contends as concealed income is the sums involved in the two aspects of the matter alluded to supra.

2(e) The above said order of penalty dated 24.9.2013 is the lone core issue in this case.

2(f) The order of penalty, as aforesaid, passed by the Deputy Commissioner of Income Tax, Central Circle II(5), Chennai, was carried in appeal by the Assessee. The appeal was before the Commissioner of Income Tax (Appeals) (hereinafter referred to as 'CIT' for brevity), bearing ITA No.775/15-16. The CIT, after scrutinizing the documents in a full fledged hearing, allowed the appeal holding on facts that there is no concealment of income and the instant case does not attract penalty under Section 271(1)(c) of the IT Act on both the above said aspects. Revenue carried the matter to the Income Tax Appellate Tribunal, Chennai (hereinafter referred to as 'ITAT' for brevity) by way of I.T.A.No.1009/Mds/2016. The ITAT also, after a detailed hearing and enquiry, by way of an order dated 6.9.2016 confirmed the order of CIT.

2(g) Both CIT and ITAT, on facts and on scrutiny of documents and a detailed / thorough enquiry touching upon various factual aspects, came to the conclusion with regard to disallowance qua TDS that the same was an inadvertent error on the part of the accountant. With regard to the issue relating to advances not being shown as income in the same / said assessment year, both the CIT and ITAT, concurrently, held that there is no deliberate suppression or concealment of income on the part of Assessee, as the Assessee was under the bona fide belief that advances received need not be shown as income in the same / said assessment year. We shall discuss more about this under the caption 'discussion' infra in this judgment.

2(h) With regard to this caption 'Factual Matrix', to complete the facts, it would suffice to note that the instant TCA before us has been filed by the Revenue assailing the above said order of the ITAT dated 6.9.2016.

3 DISCUSSION :

3(a) As would be evident from the factual matrix supra, the only issue that falls our consideration in the instant TCA is whether the Assessee is liable for penalty under Section 271(1)

(c) of the IT Act. In other words, the only issue that falls our consideration is whether the Assessee is guilty of concealment of income, which is deliberate.

3(b) Mr.T.R.Senthil Kumar, learned counsel appearing for the Revenue appellant would strenuously contend that the Assessee filed revised returns on 30.3.2012, only after the Revenue issued Section 143 notice on 23.9.2011 and therefore, it should be construed that the Assessee is guilty of deliberate concealment of income.

3(c) It is also not in dispute before us that as far as imposition of penalty under Section 271(1)(c) of the IT Act is concerned, there is a legal presumption against Assessee and it is for the Assessee to prima facie show bonafides in that regard. The moment the Assessee shows the same, the onus shifts to the Revenue to establish that the concealment was deliberate and willful.

3(d) Though we had not ordered notice, when the matter was heard, Mr.M.P.Senthil Kumar, learned counsel was present on behalf of the Assessee. As the learned counsel for the Assessee was present before the Court, voluntarily / by his own volition, we decided to give audience to the learned counsel appearing on behalf of the Assessee also, with the intention of getting complete and exhaustive inputs on the matter, even to decide whether to admit the TCA.

3(e) Learned counsel for the Assessee would point out that it is incorrect to say that the Assessee filed her revised return only after the issue of Section 143 notice on 23.9.2011. Learned counsel for the Assessee points out that the same issue (advances being treated as income in the same assessment year) arose for the assessee in the previous assessment years, being Assessment Year 2005-06 and 2008-09 and the CIT by orders dated 1.8.2011 held that advances received have to necessarily be shown as income in the same assessment year. On coming to know about this legal position, with the intention of not engaging in confrontation with the Revenue, the Assessee decided to accept the orders of CIT in the above said previous assessment years and give quietus to the same. As the Assessee decided to accept the orders of the CIT for the previous assessment years, the Assessee chose to file a revised return for the said assessment year on 30.3.2012.

3(f) Be that as it may, one other important factor, which the learned counsel for the Assessee would point out, is in the balance sheet that was annexed to the Return (even the original return filed before the revised return) clearly shows the advance which the Assessee has received and therefore, there is no intention at all on the part of the Assessee to conceal. The learned counsel for the Assessee would further submit that the Assessee was under the bona fide belief that it is not necessary to show the advances received in the said assessment year as income as she may have to return the advances received,

if ultimately she is not able to perform her work for one reason or the other. However, as stated supra, in the light of the order of the CIT in the previous assessment years, the Assessee decided to file the revised return and showed the advances as income in the same assessment year, i.e., the said assessment year.

3(g) This submission on behalf of the Assessee that advances received were shown in the balance sheet even with the original return and therefore, there is no intention to conceal, much less intention to conceal deliberately finds favour with us. However, we proceed to discuss the matter further.

3(h) Learned counsel for the Revenue would strenuously contend that it is a fit case for imposing penalty under Section 271(1)(c) of the IT Act and to buttress his submission, the learned counsel pressed into service two case laws, namely, MAK Data (P.) Ltd. Vs. Commissioner of Income Tax-II [(2013) 38 Taxmann.com 448 (SC)] and N.Ranjit Vs. Commissioner of Income Tax-V, Chennai [(2013) 239 CTR 558] (Madras High Court DB).

3(i) We have given our careful consideration to the ratio in the two case laws. In MAK Data (P.) Ltd.'s case, certain amounts received as share application money, was concealed and in response to a show cause notice, the Assessee offered the same as income. Therefore, it is clearly distinguishable on facts.

3(j) With regard to N.Ranjit's case, the Assessee had concealed the capital gains and in the course of enquiry by the investigation against Assessee's wife with regard to certain mutual fund transactions made by her, this concealment surfaced. Therefore, N.Ranjit's case is also clearly distinguishable on facts. However, there can be no dispute that the final outcome of any case and the manner / mode of disposal adopted by the court is not in any manner relevant for applying the ratio in the given case. Therefore, in N.Ranjit's case though on facts the Division Bench confirmed the conclusion that the assessee had concealed income and was liable to be mulcted with penalty, the ratio is that the penal provisions are not automatic and the levy itself depends upon the facts and circumstances of each case. The said finding is found in part of paragraph 12 of N.Ranjit's case, which reads as follows :

"12.It is not that every case of addition warrants levy of penalty. The application of penal provisions are not automatic and the levy itself depends upon the facts and circumstances of each case."

3(k) Learned counsel for the Revenue, though had filed some other case laws, had pressed into service only these two case laws and we have dealt with these two case laws.

3(1) Though it was not argued in the course of oral submissions, in the hearing before us, we find that in the written submissions filed by the Revenue, the learned counsel for the Revenue has pressed into service a judgment of a Division Bench of this Court, being Commissioner of Income-tax Vs. J.K.A. Subramania Chettiar [(1977) 110 ITR 602 (MAD)]. Pressing into service this judgment, the Revenue would contend that meaning of the words 'Omission' and 'Discover', as occurring in Section 139(5) of the Income-tax Act, 1961, have to be read in the light of the ratio in J.K.A. Subramania Chettiar's case. We find that the ratio in J.K.A. Subramania Chettiar's case runs as follows :

"In our opinion, section 139(5) will apply only to a limited category of cases, namely, where in the original return there was any omission or any wrong statement. The very word "omission" connotes an unintentional act. Equally, the words "wrong statement" will not take in "a statement known to be false to the person who made the Statement." However, the word "discovers" occurring in Section 139(5) will make it clear that at the time of discovery only, a person who has furnished a return finds out that an inadvertent omission or an unintended wrong statement had crept in the return filed by him. If a person who furnished the return was aware of the falsity of the statement and the incorrectness of the particulars of income even at the time when he filed the original return, there was no question of that person subsequently discovering the existence of the omission or creeping in of the wrong statement in the return already filed by him. Therefore, we are of the opinion that Section 139(5) will apply only to cases of "omission or wrong statements" and not to cases of "concealment or false statements". This conclusion of ours derives support from the language used in Section 139(5)."

3(m) However, we find that J.K.A. Subramania Chettiar's case was one where certain hundi transactions that the Assessee came forward to disclose in the revised return, were found to be of bogus nature and ultimately, the falsity of hundi transactions was admitted. More over, it was a clear case of filing revised returns after being 'found out'. Therefore, J.K.A. Subramania Chettiar's case is clearly distinguishable on facts and whatever the Division Bench has opined there is only in the context of that factual matrix. In our opinion, it does not help the Revenue in the instant case owing to the factual matrix. However, even if the opinion of the Division Bench,

which has been extracted supra, is applied to the facts of this case, it does not help the Revenue as there was no concealment by the Assessee and there was no statement made by the Assessee knowing it to be false. As stated supra, the balance sheet revealed the advances received and at that point of time, the question of whether advances received in the assessment year should be shown in the same assessment year, was before the CIT for previous assessment years for the same Assessee.

3(n) Therefore, we have no hesitation in persuading ourselves to hold that the Assessee, in the instant case, has not concealed the income deliberately (particularly in the light of the fact that advances have been shown in the balance sheet filed even along with the original return) and therefore, is not liable for imposition of penalty under Section 271(1)(c) of the IT Act.

3(o) With regard to disallowance qua non furnishing of chalans for deduction and remittance of TDS, on facts the CIT had come to the conclusion that it is an inadvertent error on the part of the accountant. This has been confirmed by the ITAT.

3(p) Hearing a TCA under Section 260A of the IT Act, we will not reexamine factual findings. We take it that the factual findings arrived at by the CIT and confirmed by the ITAT are conclusive.

3(q) Having said this, it takes us to the proposed / substantial questions of law, on which the Revenue wanted this TCA to be admitted. Questions, which according to the Revenue are substantial questions of law as proposed by the Revenue, in the instant TCA, read as follows :

"1. Whether on the facts and in the circumstances of the case, the Hon'ble Appellate Tribunal was correct in law in holding that additional income declared by the assessee by filing revised return consequent to notices u/s.143(2) and 142(1) does not attract penalty u/s.271(1)(c) of Income Tax Act, 1961?

2. Whether the Tribunal is right in law in treating the revised return filed by the assessee as a valid return and holding that the same was filed to avoid confrontation with the Revenue and thereby coming to the conclusion that the additional income declared therein does not form a basis for levy of penalty u/s.271(1)(c) of the Income Tax Act, whereas, the original return filed by the assessee has no omission so as to treat the revised return as a valid one?

3. Whether on the facts and in the circumstances of the case and in law, the admission made by the assessee in the revised return offering higher amount of income does not attract penalty in view of Explanation 1 to

Section 271(1)(c) of the Income Tax Act, 1961?

4. Whether on the facts and in the circumstances of the case, the Tribunal is right in law in confirming the order of the CIT(A) wherein it was held that the disallowance u/s.40(a)(ia) does not attract penalty u/s.271(1)(c) of the Income Tax Act, 1961?"

3(r) We have carefully examined the questions set out supra, which according to the Revenue are substantial questions of law.

3(s) Section 260A(7) of the IT Act has clearly mandated that the provisions of the Code of Civil Procedure, 1908 ('CPC', for brevity), relating to appeals to the High Court shall, as far as may be, apply in the case of appeals under this section. Therefore, we turn to Section 100 of CPC, which deals with the admission of a second appeal on substantial questions of law.

3(t) Hon'ble Supreme Court has given the same meaning to the concept of 'substantial question of law' to both these provisions, i.e., Section 100 CPC and Section 260A of IT Act. This can be inferred from the judgment of M. Janardhana Rao Vs. Joint Commissioner of Income Tax [2005 273 ITR 50 (SC) = (2005) 2 SCC 324], wherein the Supreme Court remanded to the High Court the appeal under Section 260A of IT Act since substantial questions of law were not framed at the time of admission and were framed after the conclusion of arguments. In doing so, it referred to the Apex Court judgment in Sir Chunilal V. Mehta & Sons Ltd. vs Century Spg. & Mfg. Co. Ltd. [AIR 1962 SC 1314] to enumerate the principles regarding substantial question of law. Though Chunilal Mehta's case dealt with Article 133(1) of the Constitution of India which provides for certificate of appeal to be granted by the High Court, if the case involves a substantial question of law of general importance, it was cited by the Apex Court to enumerate the principles regarding the concept of 'substantial question of law'. The same case was referred to by the Supreme Court in Hero Vinoth Vs. Seshammal [(2006) 5 SCC 545] to lay down the principles regarding substantial question of law in an appeal under Section 100 of CPC.

3(u) We notice that the Hon'ble Supreme Court of India in Hero Vinoth's case has clearly held that the substantial question of law occurring in Section 100 CPC is different and distinct from a mere question of law. Relevant paragraph reads as follows :

"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. "

3(v) With regard to 'substantial question of law', the tests laid down by the Supreme Court of India for finding out whether a given set of questions of law are mere questions of law or substantial questions of law is found in Hero Vinoth's case judgment. The ratio laid down by the Supreme Court is found in paragraphs 21 to 23 of the said judgment, which read as follows :

"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] .) "

3(w) We applied the above test in the instant case. There is no debatable question of law of substance necessary for determining the rights of the parties in the case. This is just a case where the question as to whether the assessee is liable to be mulcted with penalty under Section 271(1)(c) of IT Act in the given fact scenario / conduct needs to be answered. Therefore, we have no hesitation whatsoever in holding that the proposed questions of law are definitely not substantial questions of law.

3(x) We are of the view that they may not even qualify as pure questions of law as they are all turning heavily on facts.

3(y) We have held elsewhere in this judgment that the factual findings returned by the CIT and ITAT are held to be conclusive as we are sitting in Section 260A of the IT Act.

4 CONCLUSION :

4(a) Owing to all that have been stated supra, we have no hesitation whatsoever in holding that no substantial questions of law arise in the instant TCA and the same deserve to be dismissed.

4(b) We have also concluded that the assessee is not guilty of deliberate concealment of income and is not liable to be mulcted with penalty under Section 271(1)(c) of the IT Act.

5 DECISION :

5(a) This TCA is dismissed, confirming the order of the ITAT dated 6.9.2016 bearing reference No.I.T.A.No.1009/Mds/2016, which in turn confirms the order of the CIT dated 20.01.2016 bearing reference ITA No.775/15-16. The CIT order has set aside the order of the Deputy Commissioner of Income Tax, Central Circle II(5), Chennai, dated 24.9.2013, imposing penalty of Rs.1,16,11,020/- on the Assessee.

5(b) Considering the fact that we have not even issued notice on admission and that the learned counsel for the Assessee voluntarily appeared before this Court when the matter was taken up for admission, we are not even examining the aspect of costs. Therefore, the parties will be left to bear their respective costs.

Sd/-
Assistant Registrar (CS-IX)

//True Copy//

Sub Assistant Registrar

vvk

To

- 1.The Commissioner of Income Tax (Appeals),
Mahatma Gandhi Road,
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hennai-600 034.
- 2.The Income Tax Appellate Tribunal,
'B' Bench, Chennai.
- 3.The Deputy Commissioner of Income Tax (Appeals)18
Chennai 34.
- 4.The Asst. Commissioner of Income Tax Central Circle (5)
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- 5.The Assistant Registrar
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+1cc to Mr.G.BASKAR, Advocate, S.R.No.37338
+1cc to Mr.T.R.SENTHILKUMAR, Advocate, S.R.No.37829
(17.07.2018)

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Judgment in
T.C.A.No.239 of 2017

JP (CO)
TR(21/06/2018)