

IN THE HIGH COURT OF JUDICATURE AT MADRAS
DATED : 30.01.2018
CORAM
THE HON'BLE MS. INDIRA BANERJEE, CHIEF JUSTICE
AND
THE HON'BLE MR.JUSTICE ABDUL QUDDHOSE

Tax Case (Appeal) No.745 of 2017

The Commissioner of Income Tax,
Chennai. .. Appellant/Respondent

Vs.

M/s.Chennai Metro Rail Limited,
51/24, Nungambakkam High Road,
Chennai - 600 034
PAN : AADCC2233K ... Respondent/Appellant

PRAYER: Appeal under Section 260A of the Income Tax Act,
1961 against the order of the Income Tax Appellate
Tribunal, Madras "A" Bench, Chennai, dated 23.3.2017 passed
in I.T.A.No.2231/Mds/2016.

against the order of the Principal Commissioner of Income
Tax Chennai-1 made in C.No.218(3)/Pr.CIT-1/263/2015-2016
dated 09/03/2016.

against the order of the Deputy Commissioner of Income Tax,
Company Circle 1(3) chennai-34 made in PAN/GIR
No.AAOCC2233K dated 06.03.2014, Assessment year 2011-2012.

For Appellant : Mrs.R.Hemalatha
Standing Counsel

For Respondent : Mr.M.P.Senthilkumar

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JUDGMENT

(Delivered by the Hon'ble Chief Justice)

This appeal filed by the Commissioner of Income Tax,
Chennai is against an order dated 23rd April 2017 passed by
the Income Tax Appellate Tribunal "A" Bench, Chennai
allowing the appeal being I.T.A.No.2231 of 2016 and

dismissing I.T.A.Nos.2230 & 2232 of 2016 pertaining to the assessment year 2011-12.

2. The respondent Assessee, M/s.Chennai Metro Rail Limited, is a Government company within the meaning of Section 617 of the Companies Act, 1956. The company filed its income tax return for the assessment year 2011-12 on 11th January 2012 claiming refund of Rs.19,44,490/-. Later, on 26th February 2013, the respondent Assessee filed a revised return claiming refund of Rs.2,10,91,390/-.

3. The case of the respondent Assessee was selected for scrutiny and notice was issued under Section 143(2) of the Income Tax Act, 1961 (hereinafter referred to as "the Act"), which was dated 19th August 2013. Thereafter, notice was issued under Section 142(1) of the Act along with a detailed questionnaire. The representative of the respondent Assessee duly appeared on behalf of the Assessee and made submissions.

4. The assessment was completed under Section 143(3) of the Act. The income of the respondent Assessee as assessed was Rs.5,87,06,566/- after addition of Rs.5,32,60,536/- under the head income from other sources. The Assessing Officer, however, did not initiate any penalty proceedings under Section 271(1)(c) of the Act.

5. The respondent Assessee filed an appeal, which was dismissed. Subsequently, in exercise of power under Section 263 of the Act, the Principal Commissioner of Income Tax, Chennai-I passed an order holding that on examination of the records it was found that the assessment order had established that the Assessee had concealed his income by filing inaccurate particulars of income and thus penal provisions under Section 271(1)(c) of the Act were clearly attracted. The Assessing Officer had, however, failed to initiate penalty under Section 271(1)(c) of the Act thereby making the assessment order for the assessment year 2011-12 erroneous and prejudicial to the interest of Revenue.

6. A show cause notice under Section 263 of the Act was issued to the respondent Assessee proposing to revise the assessment order under Section 263 of the Act. The Principal Commissioner of Income Tax, Chennai-I held thus:

"4. In the instant case, the Assessing Officer while passing the order u/s 143(3) had established that the assessee had concealed his taxable income by filing inaccurate particulars of income and therefore penalty u/s 271(1)(c) was clearly attracted in the case, which the Assessing Officer failed to initiate.

5. It is well established that the assessing

officer has to initiate proceedings for imposition of penalty during the course of the assessment itself. If he fails to initiate or record his satisfaction for the initiation of the penalty proceedings during the course of the assessment proceedings, it would be a case where the assessment order can be said to be erroneous as he has not decided a point or recorded a finding on an issue which ought to have been done or decided during the course of the assessment proceedings. Hence the omission of the Assessing Officer to initiate penalty during the course of Assessment renders the assessment order erroneous and prejudicial to the interest of the revenue.

6.If in any proceeding of the assessment, the Assessing Officer fails to take notice of the facts attracting the provisions contained u/s 271(1)(c) of the Act, it could not be said that his failure to take notice of the facts which were before him attracting the provisions of section 271(1)(c) of the Act does not amount to an error prejudicial to the interest of the revenue. Therefore, if an Assessing Officer during the pendency of the proceeding has omitted to take notice of the facts attracting section 271(1)(c) of the Act which ultimately ended in an order of assessment, the order would be erroneous and prejudicial in the interest of revenue.

6.In view of the above, it is held that, the assessment order u/s 143(3) passed by the assessing officer for A.Y. 2011-12 is erroneous and prejudicial to the interest of the public revenue. Hence the Assessing Officer is directed to reframe the assessment afresh in accordance with the provisions of law."

7. The respondent Assessee filed an appeal being I.T.A.No.2231 of 2016 against the order under Section 263 of the Act in so far as it related to penalty.

8. By the order under appeal, which was a common order, the appeal, being I.T.A.No.2231 of 2016, filed by the respondent Assessee was allowed and the other appeals were dismissed. The Appellate Tribunal held thus:

"6. We have considered the rival submissions on either side and perused the material available on record. The Assessing Officer completed the assessment under Section 143(3) of the Act by making an addition of Rs.5,32,60,563/- under the head income from other sources. However the Assessing Officer has not recorded any satisfaction for initiating penalty proceeding under Section 271(1)(c) of the Act. The Commissioner in exercise of his power under Section 263 of the Act found that the failure of the Assessing Officer to record satisfaction and to initiate penalty proceeding under Section 271(1)(c) of the Act is not only erroneous but also prejudice to the interest of the Revenue. We have carefully gone through the provisions of the Section 271(1)(c) of the Act. Section 271 of the Act enables the Assessing Officer or the Commissioner or the Commissioner (Appeals) as the case may be to levy penalty under Section 271(1)(c) of the Act for concealing any part of his income or furnished inaccurate particulars of his income in the course of assessment proceeding under the Act. Therefore, it is a precondition that proceeding is pending before the Assessing Officer or the Commissioner. The question arises for consideration is whether the Principal Commissioner of Income Tax can direct the Assessing Officer to levy penalty for his failure to do in the assessment proceeding. This Tribunal is of the considered opinion that in the course of revisional proceeding, if the Commissioner found that the assessee has furnished inaccurate particulars or concealed any part of his income, definitely the Commissioner can levy penalty under Section 271(1)(c) of the Act. In this case, the Commissioner admittedly has not levied penalty under Section 271(1)(c) of the Act. Therefore, the Commissioner cannot direct the Assessing Officer to levy penalty after revising his order. Levy of penalty is the discretion of the officer before whom the proceedings are pending under the Income Tax Act. In case, penalty proceeding was initiated and dropped by the Assessing Officer such a proceeding could be revised by the Commissioner on the ground that dropping of the penalty proceeding would amount to prejudicial to the interest of the Revenue.

However the Commissioner cannot direct the Assessing Officer to initiate the penalty proceedings itself. Therefore, this Tribunal is of the considered opinion that the Commissioner is not justified in directing the Assessing Officer to initiate the penalty proceeding under Section 271(1)(c) of the Act. Accordingly, the order of the Principal Commissioner is set aside and the appeal of the assessee is allowed."

9. Being aggrieved, the Revenue has filed the instant appeal. The question of law raised in this appeal is whether the Commissioner could have directed the Assessing Officer to initiate penalty proceedings when the Assessing Officer had not arrived at any finding in this regard?

10. Learned Standing Counsel appearing on behalf of the Revenue has referred to Section 263 of the Act, which provides as follows:

"Revision of orders prejudicial to revenue.

263.(1) The Principal Commissioner or Commissioner may call for and examine the record of any proceeding under this Act, and if he considers that any order passed therein by the Assessing Officer is erroneous in so far as it is prejudicial to the interests of the revenue, he may, after giving the assessee an opportunity of being heard and after making or causing to be made such inquiry as he deems necessary, pass such order thereon as the circumstances of the case justify, including an order enhancing or modifying the assessment, or cancelling the assessment and directing a fresh assessment.

[Explanation 1.]-For the removal of doubts, it is hereby declared that, for the purposes of this sub-section,-

(a) an order passed on or before or after the 1st day of June, 1988 by the Assessing Officer shall include-

(i) an order of assessment made by the Assistant Commissioner or Deputy Commissioner or the Income-tax Officer on the basis of the directions issued by the Joint Commissioner under section 144A;

(ii) an order made by the Joint Commissioner in exercise of the powers or in the performance of the functions of an Assessing Officer conferred on, or assigned to, him under the orders or directions issued by the Board or by the

Principal Chief Commissioner or Chief Commissioner or Principal Director General or Director General or Principal Commissioner or Commissioner authorised by the Board in this behalf under section 120;

(b) "record" shall include and shall be deemed always to have included all records relating to any proceeding under this Act available at the time of examination by the Principal Commissioner or Commissioner;

(c) where any order referred to in this sub-section and passed by the Assessing Officer had been the subject matter of any appeal filed on or before or after the 1st day of June, 1988, the powers of the Principal Commissioner or Commissioner under this sub-section shall extend and shall be deemed always to have extended to such matters as had not been considered and decided in such appeal.

[Explanation 2.—For the purposes of this section, it is hereby declared that an order passed by the Assessing Officer shall be deemed to be erroneous in so far as it is prejudicial to the interests of the revenue, if, in the opinion of the Principal Commissioner or Commissioner,—

(a) the order is passed without making inquiries or verification which should have been made;

(b) the order is passed allowing any relief without inquiring into the claim;

(c) the order has not been made in accordance with any order, direction or instruction issued by the Board under section 119; or

(d) the order has not been passed in accordance with any decision which is prejudicial to the assessee, rendered by the jurisdictional High Court or Supreme Court in the case of the assessee or any other person.]

(2) No order shall be made under sub-section (1) after the expiry of two years from the end of the financial year in which the order sought to be revised was passed.

(3) Notwithstanding anything contained in sub-section (2), an order in revision under this section may be passed at any time in the case of an order which has been passed in consequence of, or to give effect to, any finding or direction

contained in an order of the Appellate Tribunal, National Tax Tribunal, the High Court or the Supreme Court.

Explanation.—In computing the period of limitation for the purposes of sub-section (2), the time taken in giving an opportunity to the assessee to be reheard under the proviso to section 129 and any period during which any proceeding under this section is stayed by an order or injunction of any court shall be excluded."

11. Section 263 of the Act empowers the Principal Commissioner or the Commissioner as the case may be to enhance or modify the assessment, cancel the assessment or direct a fresh assessment as the circumstances of the case might justify.

12. Referring to the definition of "assessment" in Section 2 (8) of the Act, Mrs. Hemalatha, learned Standing Counsel appearing on behalf of the Revenue submitted that "assessment" included reassessment.

13. Section 271(1) of the Act provides as follows:

"Failure to furnish returns, comply with notices, concealment of income, etc.

271.(1) If the Assessing Officer or the Commissioner (Appeals) or the Principal Commissioner or Commissioner in the course of any proceedings under this Act, is satisfied that any person—

(a) [***]

(b) has failed to comply with a notice under sub-section (2) of section 115WD or under sub-section (2) of section 115WE or under sub-section (1) of section 142 or sub-section (2) of section 143 or fails to comply with a direction issued under sub-section (2A) of section 142, or

(c) has concealed the particulars of his income or furnished inaccurate particulars of such income, or

(d) has concealed the particulars of the fringe benefits or furnished inaccurate particulars of such fringe benefits, he may direct that such person shall pay by way of penalty,—

(i) [***]

(ii) in the cases referred to in clause (b), in addition to tax, if any, payable by him, a sum of ten thousand rupees for each such failure ;

(iii) in the cases referred to in clause (c) or clause (d), in addition to tax, if any, payable by him, a sum which shall not be less than, but which

shall not exceed three times, the amount of tax sought to be evaded by reason of the concealment of particulars of his income or fringe benefits or the furnishing of inaccurate particulars of such income or fringe benefits.

Explanation 1.—Where in respect of any facts material to the computation of the total income of any person under this Act,—

(A) such person fails to offer an explanation or offers an explanation which is found by the Assessing Officer or the Commissioner (Appeals) or the Principal Commissioner or Commissioner to be false, or

(B) such person offers an explanation which he is not able to substantiate and fails to prove that such explanation is bona fide and that all the facts relating to the same and material to the computation of his total income have been disclosed by him, then, the amount added or disallowed in computing the total income of such person as a result thereof shall, for the purposes of clause (c) of this sub-section, be deemed to represent the income in respect of which particulars have been concealed.

Explanation 2.—Where the source of any receipt, deposit, outgoing or investment in any assessment year is claimed by any person to be an amount which had been added in computing the income or deducted in computing the loss in the assessment of such person for any earlier assessment year or years but in respect of which no penalty under clause (iii) of this sub-section had been levied, that part of the amount so added or deducted in such earlier assessment year immediately preceding the year in which the receipt, deposit, outgoing or investment appears (such earlier assessment year hereafter in this Explanation referred to as the first preceding year) which is sufficient to cover the amount represented by such receipt, deposit or outgoing or value of such investment (such amount or value hereafter in this Explanation referred to as the utilised amount) shall be treated as the income of the assessee, particulars of which had been concealed or inaccurate particulars of which had been furnished for the first preceding year; and where the amount so added or deducted in the first preceding year is not sufficient to cover the utilised amount, that part of the amount so added or deducted in the year immediately preceding the first preceding year which is sufficient to cover such part of the utilised amount as is not so covered shall be treated to be the income of the assessee,

particulars of which had been concealed or inaccurate particulars of which had been furnished for the year immediately preceding the first preceding year and so on, until the entire utilised amount is covered by the amounts so added or deducted in such earlier assessment years.

Explanation 3.—Where any person fails, without reasonable cause, to furnish within the period specified in sub-section (1) of section 153 a return of his income which he is required to furnish under section 139 in respect of any assessment year commencing on or after the 1st day of April, 1989, and until the expiry of the period aforesaid, no notice has been issued to him under clause (i) of sub-section (1) of section 142 or section 148 and the Assessing Officer or the Commissioner (Appeals) is satisfied that in respect of such assessment year such person has taxable income, then, such person shall, for the purposes of clause (c) of this sub-section, be deemed to have concealed the particulars of his income in respect of such assessment year, notwithstanding that such person furnishes a return of his income at any time after the expiry of the period aforesaid in pursuance of a notice under section 148.

[Explanation 4.—For the purposes of clause (iii) of this sub-section,—

(a) the amount of tax sought to be evaded shall be determined in accordance with the following formula—

$(A - B) + (C - D)$

where,

A = amount of tax on the total income assessed as per the provisions other than the provisions contained in section 115JB or section 115JC (herein called general provisions);

B = amount of tax that would have been chargeable had the total income assessed as per the general provisions been reduced by the amount of income in respect of which particulars have been concealed or inaccurate particulars have been furnished;

C = amount of tax on the total income assessed as per the provisions contained in section 115JB or section 115JC;

D = amount of tax that would have been chargeable had the total income assessed as per the provisions contained in section 115JB or section 115JC been reduced by the amount of income in respect of which particulars have been concealed or inaccurate particulars have been furnished:

Provided that where the amount of income in respect of which particulars have been concealed or

inaccurate particulars have been furnished on any issue is considered both under the provisions contained in section 115JB or section 115JC and under general provisions, such amount shall not be reduced from total income assessed while determining the amount under item D :

Provided further that in a case where the provisions contained in section 115JB or section 115JC are not applicable, the item (C - D) in the formula shall be ignored;

(b) where in any case the amount of income in respect of which particulars have been concealed or inaccurate particulars have been furnished has the effect of reducing the loss declared in the return or converting that loss into income, the amount of tax sought to be evaded shall be determined in accordance with the formula specified in clause (a) with the modification that the amount to be determined for item (A - B) in that formula shall be the amount of tax that would have been chargeable on the income in respect of which particulars have been concealed or inaccurate particulars have been furnished had such income been the total income;

(c) where in any case to which Explanation 3 applies, the amount of tax sought to be evaded shall be the tax on the total income assessed as reduced by the amount of advance tax, tax deducted at source, tax collected at source and self-assessment tax paid before the issue of notice under section 148.]

Explanation 5.—Where in the course of a search initiated under section 132 before the 1st day of June, 2007, the assessee is found to be the owner of any money, bullion, jewellery or other valuable article or thing (hereafter in this Explanation referred to as assets) and the assessee claims that such assets have been acquired by him by utilising (wholly or in part) his income,—

(a) for any previous year which has ended before the date of the search, but the return of income for such year has not been furnished before the said date or, where such return has been furnished before the said date, such income has not been declared therein ; or

(b) for any previous year which is to end on or after the date of the search, then, notwithstanding that such income is declared by him in any return of income furnished on or after the date of the search, he shall, for the purposes of imposition of a penalty under clause (c) of sub-section (1) of this section, be deemed to have

concealed the particulars of his income or furnished inaccurate particulars of such income, unless,—

(1) such income is, or the transactions resulting in such income are recorded,—

(i) in a case falling under clause (a), before the date of the search; and

(ii) in a case falling under clause (b), on or before such date,

in the books of account, if any, maintained by him for any source of income or such income is otherwise disclosed to the Principal Chief Commissioner or Chief Commissioner or Principal Commissioner or Commissioner before the said date ; or

(2) he, in the course of the search, makes a statement under sub-section (4) of section 132 that any money, bullion, jewellery or other valuable article or thing found in his possession or under his control, has been acquired out of his income which has not been disclosed so far in his return of income to be furnished before the expiry of time specified in sub-section (1) of section 139, and also specifies in the statement the manner in which such income has been derived and pays the tax, together with interest, if any, in respect of such income.

Explanation 5A.— Where, in the course of a search initiated under section 132 on or after the 1st day of June, 2007, the assessee is found to be the owner of—

(i) any money, bullion, jewellery or other valuable article or thing (hereafter in this Explanation referred to as assets) and the assessee claims that such assets have been acquired by him by utilising (wholly or in part) his income for any previous year; or

(ii) any income based on any entry in any books of account or other documents or transactions and he claims that such entry in the books of account or other documents or transactions represents his income (wholly or in part) for any previous year, which has ended before the date of search and,—

(a) where the return of income for such previous year has been furnished before the said date but such income has not been declared therein; or

(b) the due date for filing the return of income for such previous year has expired but the assessee has not filed the return,

then, notwithstanding that such income is declared by him in any return of income furnished on or after the date of search, he shall, for the purposes of imposition of a penalty under clause (c) of sub-

section (1) of this section, be deemed to have concealed the particulars of his income or furnished inaccurate particulars of such income.

Explanation 6.—Where any adjustment is made in the income or loss declared in the return under the proviso to clause (a) of sub-section (1) of section 143 and additional tax charged under that section, the provisions of this sub-section shall not apply in relation to the adjustment so made.

Explanation 7.—Where in the case of an assessee who has entered into an international transaction or specified domestic transaction defined in section 92B, any amount is added or disallowed in computing the total income under sub-section (4) of section 92C, then, the amount so added or disallowed shall, for the purposes of clause (c) of this sub-section, be deemed to represent the income in respect of which particulars have been concealed or inaccurate particulars have been furnished, unless the assessee proves to the satisfaction of the Assessing Officer or the Commissioner (Appeals) or the Principal Commissioner or Commissioner that the price charged or paid in such transaction was computed in accordance with the provisions contained in section 92C and in the manner prescribed under that section, in good faith and with due diligence."

14. In view of Section 271(1) read with Section 263 of the Act, the Principal Commissioner might pass such order as the circumstances of the case might justify, which could include an order enhancing or modifying the assessment or cancelling the assessment or directing a fresh assessment. Directing fresh assessment would, in our view, include assessment of penalty. It cannot, therefore, be said that the Principal Commissioner had no jurisdiction to pass such order. The issue has been decided by a Division Bench of the High Court of Allahabad in Commissioner of Income-tax v. Surendra Prasad Agrawal, reported in (2005) 142 Taxman 653 (Allahabad). However, the Principal Commissioner, we find, has recorded a finding that "on examination of the records, it is found that the Assessing Officer had in the assessment order established that the Assessee had concealed his income by filing inaccurate particulars". There is no such finding in the order of assessment. The Principal Commissioner seems to have distorted the order of assessment. The finding of the Principal Commissioner is to that extent perverse.

15. In our view, in the absence of any finding of the Assessing Officer with regard to concealment of income or with regard to furnishing of inaccurate particulars of income, the Commissioner clearly erred in holding that omission to record

satisfaction to initiate penalty proceedings was erroneous or prejudicial to the interest of Revenue. The learned Tribunal rightly set aside the direction of the Principal Commissioner directing the Assessing Officer to initiate penalty proceedings although we may not agree with the reasoning in its entirety.

16. The appeal, thus, fails and the same is dismissed. No costs.

Sd/-
Assistant Registrar(CS V)

//True Copy//

Sub Assistant Registrar

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To:

1. The Registrar
Income Tax Appellate Tribunal
"A" Bench, Chennai.
2. The Principal Commissioner of Income Tax, Chennai-1,
Chennai-34.
3. The Dy. Commissioner of Income Tax,
Company Circle 1(3),
Chennai.

+2 cc to Mr.G.Baskar Advocate sr 6867,734
+1 cc to Mr.T.Ravikumar Advocate sr 6872

Tax Case (Appeal) No.745 of 2017

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