

In the High Court of Judicature at Madras

Dated : 28.8.2018

Coram :

The Honourable Mr.Justice T.S.SIVAGNANAM

and

The Honourable Mrs.Justice V.BHAVANI SUBBAROYAN

Tax Case Appeal No.905 of 2017 & CMP.No.13875 of 2018

K.Rajiv, legal representative of
late Shri.M.S.Krishnamurthy ...Appellant

Vs

The Additional Commissioner of
Income Tax, Non Corporate
Circle-3, No.121, Mahatma
Gandhi Road, Chennai-34. ...Respondent

APPEAL under Section 260A of the Income Tax Act, 1961 against the order dated 16.6.2017 made in I.T.A.No.246/Mds/2017 on the file of the Income Tax Appellate Tribunal, Chennai Bench 'D' for the assessment year 2002-03, against the order of the Commissioner of Income Tax(Appeals)-4 dated 28/10/16 in ITA NO.102/13-14/ Assessment year 2002-03/CIT(A)-4 against the assessment order dated 29.12.09 for the Assessment year 2002/03 passed by the Assistant Commissioner of Income Tax Circle-XV, Chennai-34.

For Appellant : Mr.M.V.Swaroop

For Respondent : Mr.T.Ravikumar, SSC

Judgment was delivered by T.S.SIVAGNANAM, J

This appeal, by the legal representative of the deceased assessee - one late Mr.M.S.Krishnamurthy, is directed against the order passed by the Income Tax Appellate Tribunal, Chennai 'D' Bench in ITA.No.246/Mds/2017 for the assessment year 2002-03, raising the the following substantial questions of law :

"i. Whether the Income Tax Appellate Tribunal erred in remanding the matter back to the Commissioner of Income Tax (Appeals) second time as there was no factual dispute between the parties and the Commissioner of Income Tax (Appeals) in its subsequent order had given a conclusive order on the entire factual matrix of the case pursuant to the

directions of the Income Tax Appellate Tribunal ?

ii. Whether the Income Tax Appellate Tribunal erred in remanding the matter back to the Commissioner of Income Tax (Appeals) when all the material placed before it were present before the Commissioner of Income Tax (Appeal) when he passed the order ?

iii. Whether the Income Tax Appellate Tribunal erred in not recording a finding that the respondent had not produced any fresh material to be considered, but still remanding the appellant's case to the Commissioner of Income Tax (Appeals) for fresh consideration on undisputed factual questions ? And

iv. Whether the Income Tax Appellate Tribunal erred in not deciding the issue with regard to relevant year of taxation, on which, according to the impugned order itself, there are no fresh materials produced ?"

2. The assessee filed the return of income on 12.12.2002 for the assessment year 2002-03 admitting a total income of Rs.3,51,885/-. The return was processed under Section 143(1) of the Income Tax Act, 1961 (for brevity, the Act) and an intimation was received by the Assessing Officer of the assessee from the Assistant Commissioner of Income Tax, Company Circle I (3), Chennai that M/s.Citadel Aurobindo Biotech Limited (hereinafter called the CABL) had paid a sum of Rs.6 Crores to the assessee being non compete fee and that the payment of such an amount had been agreed to be paid during the financial year relevant to the assessment year 2002-03.

3. Based on such intimation, the assessment was reopened by issuance of a notice dated 23.3.2009 under Section 148 of the Act. The assessee sent a reply dated 30.3.2009 requesting that the original return filed might be treated as the return filed in response to the notice under Section 148 of the Act and also requested the reasons for reopening. The reasons for reopening were furnished by the Assessing Officer vide letter dated 25.8.2009. Subsequently, a notice under Section 143(2) of the Act dated 18.9.2009 was issued, in response to which, the assessee filed the reply dated 03.10.2009.

4. After verification of the details furnished and going through the return of income, the assessment was completed for the assessed income of Rs.6,03,51,885/- as against the return of income of Rs.3,51,885/-. In the assessment order, the Assessing Officer added back the entire amount of Rs.6 Crores being the amount of non compete fee received by the assessee from the CABL and treated the same as income from business and profession received and accrued during the year under consideration.

5. Aggrieved by the said order, the assessee filed an appeal before Commissioner of Income Tax (Appeals)-XII [for brevity the CIT (A)], who, by order dated 24.9.2010, partly allowed the appeal in favour of the assessee i.e. with regard to addition of Rs.6 Crores under the head 'non compete fee'. As against the order passed by the Appellate Authority, the Department preferred an appeal before the Tribunal. The Tribunal, by order dated 15.2.2012, set aside the order passed by the Appellate Authority and restored the matter back to the file of the CIT (A) with certain directions. On remand, the CIT (A) took up the matter for adjudication. While so, it came to light that the assessee - the said Mr.M.S.Krishnamurthy died on 06.1.2012 and his legal representative and son - Mr.K.Rajiv was permitted to represent the deceased assessee.

6. The CIT (A), vide order dated 28.10.2016, partly allowed the appeal filed by the assessee by holding that the amount of Rs.6 Crores received/ receivable by the assessee was treated only as capital receipt, that since he was not an employee of the new company, the receipt of non compete fee could not be treated as profit in lieu of salary and that therefore, the addition of Rs.6 Crores was deleted. As against the order dated 28.10.2016 passed by the CIT (A), the Revenue preferred an appeal before the Tribunal. The Tribunal, by the impugned order dated 16.6.2017, partly allowed the appeal filed by the Revenue for statistical purposes and remanded the matter once again to the CIT (A). Aggrieved by that, the appellant is before this Court.

7. We have heard Mr.M.V.Swaroop, learned counsel for the appellant and Mr.T.Ravikumar, learned Senior Standing Counsel for the Revenue.

8. The short issue, which falls for consideration, is as to whether the Tribunal could have remanded the matter for the second time to the CIT (A) for a decision as to whether the sum of Rs.6 Crores received/receivable by the assessee should be treated as a capital receipt or a revenue receipt.

9. in the decision in the case of Cholamandalam MS General Insurance Co. Vs. Assistant/Deputy CIT [reported in (2014) 41 Taxmann.com 29], two of the questions, which fell for consideration, were as to whether the Tribunal exercised its power of remand judiciously and in accordance with law and as to whether the Tribunal was right in law in remanding the matter back to the file of the Assessing Officer even when no new material had been produced before it and when all the materials were placed before the lower authorities. While answering the said questions, the Division Bench of this Court held that in the background of the jurisdiction of the Tribunal as a Fact Finding Authority, the Tribunal should have acted with greater circumspection to order a remand, particularly when the Revenue itself did not dispute that the materials were all those that were considered by the Assessing Officer. It was pointed out that remand is not a power to be exercised in a routine manner

and should be used sparingly as an exception only when the facts warranted such course of action. It was held that the Tribunal should have arrived at its own conclusion on facts after due consideration of the materials before it, which were no different from which were placed before the Authorities below.

10. In the case before us, there is no dispute in respect of the fact that the assessee did not place any new material before the Tribunal even in the first round, when it passed the order dated 15.2.2012 remanding the matter to the CIT (A). A perusal of the order passed by the Tribunal dated 15.2.2012 would show that the Tribunal referred to the case of two other directors of the company namely Mr.P.Rajendra Rao and Mr.M.Ranjan Rao and in the case of those assesseees, certain documents were filed by them at the appellate stage. Therefore, the Tribunal passed an order to remand the matter. When this was placed before the Tribunal, it appears that the authorized representative of the assessee did not raise a serious objection to the remand. The Tribunal, following the decision in the case of the said Mr.M.Ranjan Rao, allowed the appeal filed by the Revenue and remanded the matter to the CIT (A).

11. Thus, it is evidently clear that there is absolutely no fresh material produced by the legal representative of the deceased assessee before the CIT (A) or before the Tribunal. Nevertheless, on remand, the matter was taken up for consideration by the CIT (A). Thus, the scope of remand order passed by the Tribunal was essentially to examine the nature of receipt/ receivable of Rs.6 Crores and as to whether it is a capital receipt or revenue receipt. Further, the scope of remand was to compare the case of the assessee with that of the other two directors namely the said Mr.P. Rajendra Rao and the said Mr.M.Ranjan Rao. We find that the CIT (A) had scrupulously followed the directions issued by the Tribunal, taken note of the judicial precedents as well as the factual position and discussed the differences and the substantiating features between the assessee and the two directors such as the said Mr.P.Rajendra Rao and the said Mr.M.Ranjan Rao.

12. This distinction in the nature of differences in the facts of the case was brought out by the CIT (A) in a tabulated form in paragraph 17 of the order dated 28.10.2016. From the details furnished therein, it is clear that the assessee was never an employee in the new company and therefore, the assessee had a scope to compete. Further, there was no employer - employee relationship between the payer company and the assessee and therefore, the payment could not be assessed under the head 'salary'. Further, the CIT (A) held that the legal representative of the deceased assessee had not raised any new point at first appellate stage for deciding the issues.

13. Thus, in our considered view, there was no sufficient material before the Tribunal to remand the case for a fresh consideration at the first instance. Nevertheless, we refrain from dwelling upon the said subject further because the assessee

accepted the order and participated in the de novo proceedings before the CIT (A). The next issue, which was taken up for consideration by the CIT (A) was with regard to the distinction between the non compete fee and the good will. The CIT (A) held that the addition of Rs.6 Crores should be deleted.

14. Further, it is relevant to point out that out of Rs.6 Crores, the assessee received only Rs.1 Crore and by the time the remaining payment was made, the company namely the CABL became defunct for having incurred huge losses during the financial years 2003-04 and 2004-05 with negative net worth of Rs.68.49 Crores. When the Revenue carried the matter by way of appeal challenging the order of the CIT (A) dated 28.10.2016, the Tribunal ought to have decided the issue, if, in its opinion, the finding rendered by the CIT (A) was either factually incorrect or legally not tenable. However, there was no such finding to that effect. But, the Tribunal proceeded on the basis that the assessee should bring materials or evidence on record to substantiate or prove his claim.

15. As pointed out earlier, the assessee had not produced any new material at any point of time or at the first appellate stage. Therefore, the Tribunal should have decided the issue one way or the other and taken a stand as to whether the amount received/receivable was a capital receipt or a revenue receipt. The reasons assigned by the Tribunal are not convincing and some of the reasons appear to be the personal opinion of the Tribunal and not borne out by records. One such observation made by the Tribunal is that because of the advanced stage of the life of the assessee, it is unlikely that he would start a new venture risking both the regular income that he could otherwise fetch by self employment or by service. We find that there is no material on record to arrive at such a finding.

16. The Tribunal ought to have examined the case based upon the covenants contained in the agreement dated 27.3.2002 between the CABL and the assessee namely the said late Mr.M.S.Krishnamurthy. The said agreement states that for a period of ten years, the assessee would refrain himself from carrying on the business of marketing/promoting ethical allopathic branded pharmaceutical formulations in the Union of India and the Kingdom of Nepal. The covenantor namely the assessee acknowledged that if he was not restricted from competing with the CABL, the CABL would potentially suffer considerable economic prejudice including the loss of custom and goodwill. Accordingly, it was decided that to protect the interests of the CABL, the covenantor namely the assessee agreed to a restraint of trade undertaking in favour of the CABL to ensure that he was precluded from carrying on certain activities, which would be harmful to the business of the CABL. The said agreement further states that in consideration for the restraint undertakings given by the covenantor, the CABL should, within a period of ten years from the date of the said agreement, pay the covenantor an aggregate amount of Rs.6

Crores.

17. Thus, it is evidently clear that the case of the assessee could not have been treated on par with other persons such as the said Mr.P.Rajendra Rao and the said Mr.M.Ranjan Rao for the simple reason that the said persons had become the employees of the payer company, that the payment was received from the prospective employer and that the Department made a submission that there was no scope for competition. However, the facts of the present case are wholly different.

18. The Tribunal does not dispute the covenants contained in the said agreement nor can it dispute the same in the absence of any evidence produced by the Department. In the said agreement, the non compete fee clause is clear by the assessee agreeing not to enter into any trade or start a similar production or enter into any competition with another party and the payment of non compete fee is for an action by the payee on a future date. The said payment of non compete fee is bound by a contractual requirement and it is a contractual right conferred on the assessee and in the event any violation, it was well open to the assessee to enforce the terms of the contract.

19. Thus, we find that the order of remand passed by the Tribunal is wholly unjustified and the facts as brought out by the CIT (A) after the first remand vide order dated 28.10.2016 are just and proper and in the absence of any new material produced by the assessee, the question of remanding the matter does not arise.

20. Accordingly, the tax case appeal filed by the assessee is allowed, the order of the Tribunal dated 16.6.2017 is set aside and the order passed by the CIT (A) dated 28.10.2016 is restored. The questions of law raised for consideration are answered in favour of the assessee and against the Revenue. No costs. Consequently, the connected CMP is closed.

Sd/-
Assistant Registrar(CS IX)

//True Copy//

Sub Assistant Registrar

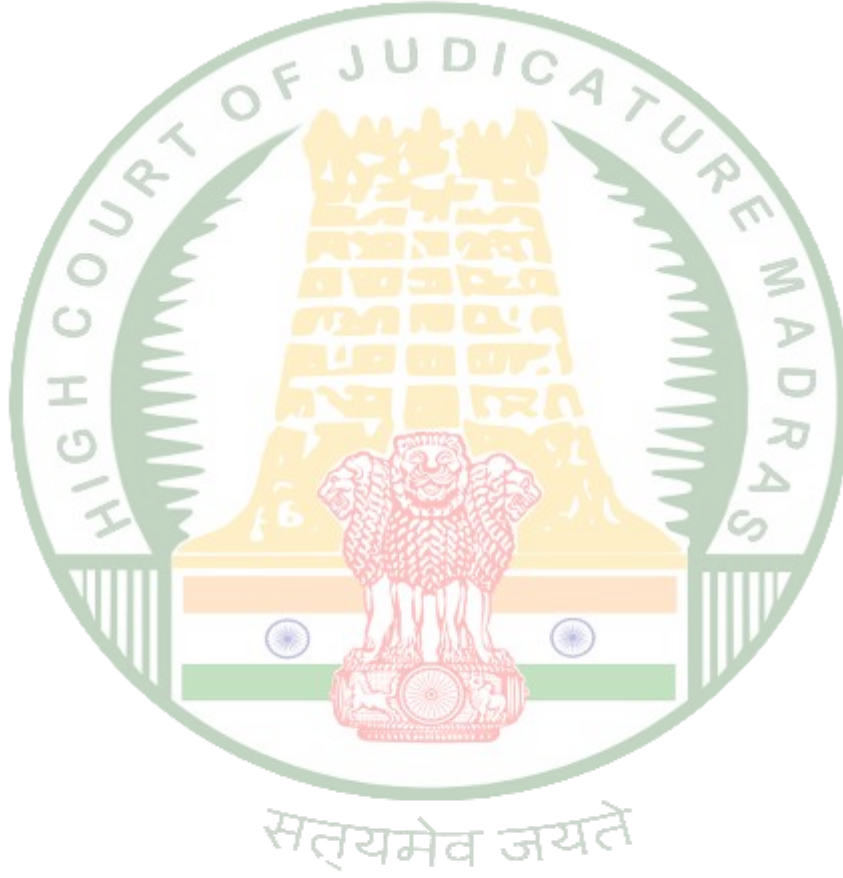
To

1.The Income Tax Appellate Tribunal, Chennai 'D' Bench, Chennai.

2.The Additional Commissioner of Income Tax, Non Corporate
Circle-3,
No.121, Mahatma Gandhi Road, Chennai-34.

TCA.No.905 of 2017 &
CMP.No.13875 of 2018

ss(co)
nr 26/09/2018



WEB COPY