IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 05.12.2018

CORAM :

THE HONOURABLE MR.JUSTICE T.S.SIVAGNANAM
and
THE HONOURABLE MR.JUSTICE N.SATHISH KUMAR

Tax Case Appeal No.628 of 2018

V.Rammohan,
New No.25,Arathoon Road,
Royapuram,
Chennai - 600 013.
PAN : AAAPR6060K. ...Appellant/Appellant

-vs-

The Assistant Commissioner of Income Tax,
Non-Corporate Circle 6, Chennai - 600 006.
...Respondent/Respondent

Tax Case Appeal filed under Section 260A of the Income Tax Act, 1961 against the order of the Income Tax Appellate Tribunal 'C/SMC' Bench, Chennai, dated 09.01.2017, in ITA No.288/Mds/2016, for the assessment year 2005-06 against the order dated 19.01.2016 made in ITA No.76(IT (A)-5/14 - 15 on the file of Commissioner of Income Tax(Appeals)5 Chennai against the order dated 27/12/2010 made in PAN No.AAAPR6060K on the file of Assistant Commissioner of Income Tax, Business Circle - XII, Chennai - 06 against the order dated 03/12/2009 made in PAN NC AAAPR 6060K on the file of Assistant Commissioner of Income Tax, Circle - XII, Chennai.

For Appellant : M/s.Pusya Sitaraman,
Senior Counsel,
For M/s.J.Sree Vidya

For Respondent : Mrs.R.Hemalatha
Senior Standing Counsel

JUDGMENT

(Delivered by T.S.Sivagnanam, J.)

This Tax Case Appeal, filed by the assessee under Section 260A of the Income Tax Act, 1961, is directed against the order of the Income Tax Appellate Tribunal 'C/SMC' Bench, Chennai, dated 09.01.2017, in ITA No.288/Mds/2016, for the assessment year 2005-06.

2.This appeal has been filed raising the following substantial questions of law:

> "(i)Whether the refundable advance received by the appellant is liable to be taxed under the Capital Gains?
>
> (ii)Whether a remand order of the Tribunal that is incapable of performance can be sustained?
>
> (iii)Whether the Tribunal can indirectly give life to a time barred re-assessment by directing the assessing officer to take it up along with the remanded matter?
>
> (iv)Whether the Amendment to Sec.45(5A) of the Finance Act 2018 is retrospective and clarificatory in nature and the appellant is right in offering the capital gains in the year of completion of the project i.e., AY 2007-08?"

3.Heard M/s.Pushya Sitaraman, learned Senior Counsel appearing for M/s.J.Sree Vidya, learned counsel for the appellant and Mrs.R.Hemalatha, learned Senior Standing Counsel for the respondent.

4.After hearing the learned counsels for the parties and carefully perusing the order passed by the Tribunal, we find that the Tribunal had set aside the order passed by the Assessing Officer to consider the assessee's case along with the assessment, which was re-opened, vide notice dated 28.08.2014.

5.The learned Senior Counsel for the assessee submits that the said proceedings have concluded much earlier and was not pending on the date when the Tribunal heard the matter and it appears that the Authorized Representative was not fully briefed and had not inadvertently stated that the reopening proceedings, pursuant to notice dated 28.08.2014, is still pending. In the light of the above, we are of the considered view that the Tribunal has to decide the appeal on merits, since the reopening proceedings, pursuant to notice dated 28.08.2014, has already attained finality and culminated in an order.

6.For the above reasons, this Tax Case Appeal is allowed, the order passed by the Tribunal is set aside and the matter is remanded to the Tribunal for fresh consideration to hear and decide the appeal on merits and in accordance with law. Consequently, the substantial questions of law are left unanswered.

7.In the result, the appeal is allowed to the extent indicated above. No costs.

mrm/abr

Sd/-
Assistant Registrar(CS-VIII)

//True Copy//

Sub Assistant Registrar

To

1. The Income Tax Appellate Tribunal,
   'C/SMC' Bench, Chennai.

2. The Assistant Commissioner of Income Tax,
   Non Corporate Circle - 6,
   Chennai.

3. The Commissioner of Income Tax,
   (Appeals) - 5, Chennai.

4. The Commissioner of Income Tax,
   (Appeals) - IV,
   121, Mahatma Gandhi Road,
   Chennai - 34.

+1cc to M/s.J.Sreevidya, Advocate, S.R.No.84141

T.C.A.No.628 of 2018

VGI(CO)
KAK(23/01/2019)