IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 10.09.2018

CORAM

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

Tax Case (Appeal) Nos.1037 to 1040
and 1197 to 1199 of 2008

Tax Case (Appeal) No.1037 of 2008:-

Commissioner of Income Tax,
Chennai. ..Appellant in all appeals

-vs-

M/s.Gem Granites,
76 Cathedral Rd.,
Chennai-600 086. ..Respondent in all the appeals

TCA.1037 to 1040/08: Tax Case Appeals filed under Section 260A of the Income Tax Act, 1961 against the order dated 05.01.2007 passed by the Income-tax Appellate Tribunal Madras 'A' Bench, Chennai in ITA No.3114/Mds/2004 for the assessment year 1998-99.

ITA No.3115/Mds/2004 for the Assessment year 1999-2000, ITA.NO.3201/Mds/2004 in the assessment year 1998-99, and ITA No.3202/Mds/2004 for the assessment year 1999-2000.

against order of the Commissioner of Income Tax (Appeals)-XII Chennai dated 24.18.2004 in ITA.NO.101 & 102/2004-05 for the assessment year 1998-99 & 1999-2000

against the order of the Commissioner of Income Tax (Centre) Circle-11, Chennai dated 12.3.2003 made in 1744/15 & 15/2002-03/263-C11/for the all the year 1998-99 & 1999-2000 ;

against the order of the Deputy Commissioner of Income Tax Central Circle-II(4), Chennai, dated 10.5.2000 made in PAN/GIR NO.243-2/G.For the assement years 1998-97 & 1999-2000.

TCA.No.1197 to 1199 of 2008: Tax Case appeals filed under Section 2 to 4 of the Income Tax Act 1961 against the order dated 27.10.2006 passed by the income tax appellate tribunal Madras 'A' Bench Chennai in ITA.No.1456/Mds/2002 for the Assessment yeart 1997-98,ITA.No.804/Mds/2003 for the

No.805/Mds/2003 for the assessment year 1999-2000;

against the order of the Commissioner of Income Tax (Central) Chennai-34 in 1744/15 & 16/2003-03/263/C-11 dated 12/3/2003 for the assessment year 1998-99 & for the Assessment year 1999-2000;

against theorder of the Commissioner of Income Tax (Central), Chennai-34, order dated 01.07.2002 in 1744/5/02-03/263/C-II for the Assessment year 1997-1998;

against the order of the Deputy Commissioner of Income Tax Central Crl.11(4) Chennai-34 dated 22.1.2001 made in G.I.NO.24302-G for the Assessment year 1997-98;

against the order of the Deputy Commissioner of Income Tax Central Cricle-II(4) Chenni,dated 1015/2000 made in PAN/GIR NO.24302-G for the assessment year 1999-2000;

against the order of the Deputy Commissioner of income tax Central Cricle-II (4) Chennai dated 27.03.2000 made in PAN/GIR.No.24302-G for the assessment year 1997-98.

For Appellant (in all cases) : Mr.M.Swaminathan, Senior Standing Counsel
: and Ms.V.Pushpa Junior Standing Counsel

For Respondent (in all cases) : Mr.M.P.Senthil Kumar

COMMON JUDGMENT

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

These appeals have been filed by the Revenue and the substantive appeals are appeals in T.C.(A) Nos.1197 to 1199 of 2008, which have been filed against the common order dated 27.10.2006, passed by the Income-tax Appellate Tribunal Madras "A" Bench, Chennai in ITA Nos.1456(Mds)/2002; and 804 & 805 (Mds)/2008 respectively for the assessment years 1997-98, 1998-99 and 1999-2000.

2.The appeals have been admitted on the following substantial question of law:-

> "Whether, in the facts and circumstances of the case, the Tribunal was right in holding that an order cannot be treated as erroneous and prejudicial to the revenue, if there are conflicting orders of the Tribunal prevailing at that time?"

3.Tax Case (Appeal) Nos.1037 to 1040 of 2008 have been filed by the Revenue challenging the giving effect to the order passed by Commissioner under Section 263 of the Income Tax Act, 1961 (hereinafter referred to as "the Act") dated 12.03.2003. The appeals, filed by the Revenue as against the said giving effect to the order, were dismissed by the Tribunal, by order dated 05.01.2007, in ITA Nos.3114 and 3115/Mds/2004 and 3201 and 3202/Mds/2004. These orders are impugned in T.C.(A) Nos.1037 to 1040 of 2008. These appeals have been admitted on the following substantial question of law:-

> "Whether in the facts and circumstances of the case, the Tribunal was right in dismissing the Department's appeal and allowing the assessee's appeal without going into the grounds raised for the reason that it has already quashed the order u/s 263 of the Income Tax Act, following which the assessment impugned was made, when the order of the Tribunal quashing the 263 order has been appealed against before this Court?"

4.The Commissioner exercised powers under Section 263 of the Act to revise the orders of assessment passed by the Assessing Officer dated 27.03.2000 and 10.05.2000 for the assessment years 1997-98 and 1999-2000 respectively.

5.In order to invoke power under Section 263 of the Act, twin conditions are required to be satisfied, as held by the Hon'ble Supreme Court in the case of Malabar Industrial Company Ltd. vs. Commissioner of Income-tax reported in (2000) 243 ITR 83 (SC). Similar issue was considered by one of us (TSSJ) in T.C.450 of 2007 dated 16.04.2018 in M/s.Agasthiya Granite (P) Ltd vs. The Assistant Commissioner of Income Tax.

6.What is important is that both the twin conditions are required to be satisfied, viz., that the assessment order should be erroneous and it should be prejudicial to the interest of the Revenue.

7.In the said decision, the Hon'ble Supreme Court also held that if there are two views possible and the Assessing Officer has followed one of the views, it cannot be treated to be an erroneous order. In the instant case, the Assessing Officer allowed netting of interest to the assessee.

8.According to the Commissioner, this was erroneous and prejudicial to the interest of Revenue. The Commissioner pointed out that the decisions of the Jurisdictional High court in the case of K.S.Subbiah Pillai & Co. (India) Pvt. Ltd. vs. CIT [(2003) 260 ITR 304 (Mad.)] and in the case of CIT vs. V.Chinnapandi [(2006) 282 ITR 389 (Mad.)] had been ignored.

9.The Assessing Officer had followed the decision in the case of Pink Star vs. DCIT [(2000) 72 ITD 137 (Mumbai)], the decision of the Mumbai Bench of the Tribunal and the decision of the Jodhpur Bench of the Tribunal in the case of ACIT vs. Sharda Gums & Chemicals Industrial Area [(2001) 76 ITD 282 (Jodh.)].

10.The learned counsel for the assessee would vehemently contend that if two views are possible, the Assessing Officer could not have been faulted for having allowed netting of interest to the assessee. In the order passed by the Commissioner, it has been pointed out that on the date when the Assessing Officer took a decision, for the assessment years in question by passing the assessment orders dated 27.03.2000 and 10.05.2000, there was a judgment of the Jurisdictional Tribunal viz., Chennai Bench-B in the case of M.S.Subbiah Pillai & Co. vs. CDIT [ITA Nos.2637 and 2638/Mds/1994; Dated 15.09.1995], which decision was subsequently affirmed by a Division Bench of this Court in K.S.Subbiah Pillai & Co. (India) (P) Ltd. (supra). Thus, though there were two views possible, the decision of the Chennai Bench of the Tribunal being the Jurisdictional Tribunal under whose jurisdiction, the Assessing Officer functions, for all purposes, it should have been followed by the Assessing Officer, as he is bound by the orders passed by the Jurisdictional Tribunal and the Jurisdictional High Court. Therefore, to that extent, we find that the Assessing Officer did not maintain judicial discipline as has been pointed out by the Hon'ble Supreme Court in Union of India And Others vs. Kamlakshi Finance Corporation [1991 (55) ELT 433 (SC)]. However, this issue has become academic in the instant case. The Court need not probe into the fact as to whether the Assessing Officer has faulted or not, since the decision taken by the Assessing Officer has now been upheld by the Hon'ble Supreme Court in ACG Associated Capsules (P) Ltd. vs. Commissioner of Income Tax [(2012) 247 CTR 0372]. The operative portion of the said decision reads as follows:-

> '14.........In this case, this Court held that the processing charges received by the assessee were part of the business turnover and accordingly the income arising therefrom should have been included in the profits and gains of business of the assessee and ninety per cent of this income also would have to be deducted under Expln. (baa) to s. 80HHHC of the Act. In this case, this Court was not deciding the issue whether ninety per cent deduction is to be made from the gross or net income of any of the receipts mentioned in cl. (1) of the Expln. (baa)."

11.In the light of the above, the substantial question of law framed for consideration in T.C.(A) Nos.1197 to 1199 of 2008, are answered against the Revenue and in favour of the assessee and the appeals filed by the Revenue are dismissed.

12.So far as the substantial question of law framed for consideration in T.C.(A) Nos.1037 to 1040 of 2008 is concerned, in the light of the decision taken in T.C.(A) Nos.1197 to 1199 of 2008, these appeals also have to necessarily fail and they are dismissed and the substantial question of law is answered against the Revenue.

13.The learned Senior Standing Counsel for the Revenue pointed out that the matter has to be remanded to the Assessing Officer to do the computation in terms of law laid down in ACG Associated Capsules (P) Ltd. (supra).

14.The learned counsel for the assessee pointed out that the orders passed by the Commissioner under Section 263 of the Act have been given effect to and the netting of interest has been allowed in favour of the assessee and it is in consonance with the order passed by the Hon'ble Supreme Court in ACG Associated Capsules (P) Ltd. (supra). However, in our view, we do not propose to go into the computation aspect and if need arises for the Assessing Officer to take a fresh decision in the matter in the light of the decision in ACG Associated Capsules (P) Ltd. (supra), he may do so in accordance with law. No costs.

Sd/-
Assistant Registrar(CS-IV)

//True Copy//

Sub Assistant Registrar

abr
To
1.The Commissioner of Income Tax, Chennai.
2.The Income-tax Appellate Tribunal Madras 'A' Bench, Chennai.
3.The Deputy Commissioner of Income Tax Central Crl.II (4) Chennai.
+ 1 cc to Mr.Swaminathan, Advocate Sr.63316
+ 1 cc to Mr. Philip George, Advocate Sr.62888

T.C.(A) Nos.1037 to 1040 and 1197 to 1199 of 2008

RSV(CO)
EU(12/11/2018)