IN THE HIGH COURT OF JUDICATURE AT MADRAS
DATED : 23.04.2018
CORAM
THE HONOURABLE MR.JUSTICE T.S.SIVAGNANAM
and
THE HONOURABLE MR.JUSTICE N.SESHASAYEE

T.C.(Appeal) No.1496 of 2008

The Commissioner of Income-tax,
Central-II, Madras. ... Appellant

Vs.

1.Shri.K.Balan (Deceased)
2.Smt.M.P.Narayani
3.Shri.K.Sivakumar
4.Shri.K.Sasikumar
5.Smt.Shyma ... Respondents

(RR2 to 5 are brought on record as Legal representatives of the deceased sole R1 vide order dated 19.10.2016 made in TCA No.1496/2008)

Tax Case (Appeal) filed under Section 260A of Income Tax Act, 1961, against the order of the Income-tax Appellate Tribunal "B" Bench, Chennai dated 14.12.2007 passed in T.I.(SS) A.No.95/Mds/2006.

AGAINST

The order of the Commissioner of Income Tax (Appeals)-IV in I.T.A.No.470/05-06 dated 15.03.2006.

The proceddings of the Deputy Commissioner of Income Tax Central Circle-II(2), Chennai -600 034 in GIR.No.702-B/Block dated 30.09.2002.

For Appellant : Mr.T.P.Senthil Kumar
For Respondents: Mr.M.P.Senthil Kumar

J U D G M E N T

(Judgment of the Court was delivered by T.S.SIVAGNANAM, J.)

Heard Mr.T.P.Senthil Kumar, learned counsel for the appellant/Revenue and Mr.M.P.Senthil Kumar, learned counsel for the respondents/assessees.

2. This appeal by the Revenue is directed against the order dated 14.12.2007, passed by the Income-tax Appellate Tribunal "B" Bench, Chennai in T.I.(SS) A.No.95/Mds/2006.

3. This appeal has been admitted on the following substantial question of law:

> "Whether on the facts and in the circumstances of the case, the Income Tax Appellate Tribunal was right in law in setting aside the order of the Commissioner of Income Tax (Appeals) and deleted the penalty levied under Section 158BFA(2) of the Income Tax Act, is valid?"

4. The question, which falls for consideration, is whether penalty under Section 158BAF(2) of the Income Tax Act, 1961 (for brevity "the Act") was leviable in the assessee's case. The assessing officer levied penalty, which was confirmed by the Commissioner of Income Tax (Appeals)-IV by an elaborate order giving detailed reasons. The Tribunal reversed the decision of the assessing officer as well as the Commissioner of Income Tax (Appeals) by the impugned order largely by placing reliance on the decision of the Hon'ble Supreme Court in Dilip N. Shroff v. JCIT reported in (2007) 291 ITR 519.

5. In our considered view, the said decision could not have been made applicable to the facts of the present case, as the said decision arose under the proceedings under Section 271(1) of the Act. Even for the sake of argument, if it is accepted that the decision in Dilip N. Shroff (supra) could be made applicable, we are guided by the recent decision of the Hon'ble Supreme Court in the case of MAK Data (P.) Ltd., vs. Commissioner of Income-tax-II reported in (2013) 38 taxmann.com 448 (SC). Thus, viewed from any angle the reliance placed by the Tribunal on the said decision was incorrect.

6. The learned counsel for the assessee submitted that there is a discretion vested with the assessing officer to impose penalty or not and only if decides to impose penalty, then the issue would be as to what would be the quantum of penalty. In other words, it is submitted that merely because the expressions used in Section 158BAF(2) of the Act is "shall not be less than the amount of tax leviable or not exceed three times the tax" does not result in reading the first part of section as mandatory. In support of the contention, the learned counsel placed reliance on the decision of the Bombay High Court in the case of Commissioner of Income Tax v. Dodsal Ltd. reported in (2009) 312 ITR 0112. Reliance was also placed on the decision of the Rajasthan High Court in the case of Commissioner of Income Tax v. Dr.Giriraj Agarwal Giri reported in (2012) 346 ITR 0152.

7. In our considered view the necessity to consider these decisions has not arisen on account of the fact that the

Tribunal has not recorded as to under what circumstances it exercised discretion in favour of the assessee. We find that the reasons contained in paragraph 6 are very vague, more particularly, in the light of the detailed reasons given by the Commissioner of Income Tax (Appeals) in its order dated 15.03.2006. The Tribunal has not rendered a final conclusion while deleting the interest, which was levied, as it used the expression “there is always a chance”. This expression would connote that the Tribunal did not render a positive finding on fact about the conduct of the assessee or the nature of business done by them, but presumed that the assessee will not be in possession of full information. Thus, we find that a closer examination of the facts ought to have been done by the Tribunal before deleting penalty under Section 158BFA(2) of the Act. Thus, we are of the view that the matter has to be remanded to the Tribunal for fresh consideration.

8. Accordingly, the appeal filed by the Revenue is allowed, the impugned order is set aside and the matter is remanded to the Tribunal for fresh consideration and the substantial question of law raised, is left open. No costs.

abr

Sd/-

Assistant Registrar(CS V)

//True Copy//

Sub Assistant Registrar

To

1.The Commissioner of Income-tax,
Central-II, Madras.

2.The Income-tax Appellate Tribunal “B” Bench,
Chennai.

3.The Commissioner of Income Tax (Appeals)-IV,
121, Mahatma Gandhi Road, Chennai-600 034.

4.The Deputy Commissioner of Income Tax
Central Circle II (2), Chennai-34

+1cc to M/s.M.P.Senthilkumar, Advocate Sr.No.30170
+1cc to M/s.T.P.Senthilkumar, Advocate SR.No.30255

PPA(CO)
sm:1.6.2018