

In the High Court of Judicature at Madras

Dated : 18.9.2018

Coram :

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

Tax Case Appeal No.143 of 2009

M/s.Jaidayal Prannath Kapur ...Appellant

Vs

Income Tax Officer, Ward VIII
(4), Chennai ...Respondent

APPEAL under Section 260A of the Income Tax Act, 1961 against the order dated 18.7.2008 in ITA No.1010/Mds/2008 on the file of the Income Tax Appellate Tribunal Madras 'B' Bench for the assessment year 2004-05 against the order of the Commissioner of Income Tax(Appeal)IX Chennai made in I.T.A. No. 358/2006-2007 dated 31.03.2008 and against the order of the Income Tax officer(Business Ward VIII(IV) Chennai 6 made in PAN/GIR No.AAAFJ3186G dated 29.12.2006 for the Assessment year 2004-2005.

For Appellant : Mr.A.S.Sriraman
For Respondent : Mr.M.Swaminathan

Judgment was delivered by T.S.SIVAGNANAM, J

The Revenue has preferred this appeal challenging the order dated 18.7.2008 passed by the Income Tax Appellate Tribunal in ITA.No.1010/ Mds/2008 for the assessment year 2004-05.

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2. The above appeal has been admitted on 22.6.2009 on the following substantial question of law :

"i. Whether the Appellate Tribunal is correct in law in concluding that the sale of land/property was correctly subjected to capital gains taxation in terms of Section 50 of the Act as against the computation reported as per Section 45 read with Section 48 of the Act ? and

ii. Whether the Appellate Tribunal is correct in law in sustaining the action of the respondent in treating the long term capital loss as speculation loss even though the findings on the non delivery of scrip/shares by the share broker on behalf of the appellant herein were not correct ?"

3. The assessee is a partnership firm dealing in purchase and sale of paper. For the assessment year under consideration (2004-05) relevant to the previous year ending 31.3.2004, the return of income was filed showing a loss of Rs.40,486/-. The said return was initially accepted under Section 143(1) of the Income Tax Act, 1961 (hereinafter called the Act) on 27.6.2006. During scrutiny assessment, which was later framed by the Assessing Officer on 29.12.2006, the assessed income was determined at Rs.1,36,22,800/- and while doing so, the Assessing Officer applied the provisions of Section 50 of the Act to compute the capital gains arising from the transfer of property owned by the assessee situated in Chennai.

4. According to the assessee, the entire asset along with land and building were shown in the balance sheet of the old firm, to which, the assessee had succeeded and the depreciation on the building had been claimed and deducted from the consolidated total. The purchase price of the land was stated to have not been shown distinctly under the head 'land', while the cost of the building was not shown separately. The assessee further stated that the depreciation was not separately deducted from the written down value (WDV) of the building while the same was deducted from the consolidated value of the land and building. The land and building in question was sold under a joint development agreement to a builder for construction of a commercial and residential complex. The assessee, sent a letter dated 26.12.2006 to the Assessing Officer, pointing out the above facts and objecting to the proposal to invoke Section 50 of the said Act.

5. The Assessing Officer did not agree with the contentions advanced by the assessee, but held that the assessee failed to furnish any concrete proof to show that only the building has been subjected to depreciation all along, that the land was not a part of the schedule for fixed asset at any point of time and

that the land was shown separately elsewhere in the balance sheet under asset projections. The Assessing Officer further held that the assessee had not given any satisfactory reply supported by documentary evidence and that the provisions of Section 50 of the Act are squarely applicable to the assessee's case. Further, the Assessing Officer, while computing the short term capital gains in terms of Section 50 of the Act, had adopted the sale consideration at Rs.3,84,35,774/- as against the contracted value of Rs.2.07 Crores adopted in their computation.

6. With regard to the claim of long term capital loss on the sale of shares, the assessee contended that the shares were bought through M/s. Aditya Securities Limited while entering into a contract of Port Folio Management on 16.11.2001 and that the share broker had bought and sold shares on behalf of the assessee and after deducting the sale value of the shares, a sum of Rs.1,05,52,013/- was claimed as long term capital loss.

7. The Assessing Officer did not agree with the submissions made by the assessee, however, held that the memorandum of agreement gave a proxy to the latter and that the contents of the agreement were formulated in a convenient and maneuvering manner in as much as the clauses in the contract would sound almost dictatorial. Accordingly, the assessee's contentions were rejected and the Assessing Officer disallowed the claim of set off of speculative loss against capital gains.

8. As against the assessment order dated 29.12.2006, the assessee filed an appeal before Commissioner of Income Tax (Appeals)-IX [for short the CIT (A)]. The appeal was dismissed vide order dated 31.3.2008. Challenging the order passed by the CIT (A), the assessee filed an appeal before the Tribunal, which was dismissed by order dated 18.7.2008, which is impugned in this tax case appeal.

9. We have heard Mr.A.S.Sriraman, learned counsel appearing on behalf of the appellant and Mr.M.Swaminathan, learned Senior Standing Counsel for the Revenue.

10. After carefully going through the facts of the case and the stand taken by the assessee before the Assessing Officer, on the first issue as to whether the depreciation was claimed on the land, we find that the factual explanation given by the assessee was not properly construed.

11. The assessee, vide letter dated 21.12.2006, had specifically stated that no depreciation was claimed on the building after 31.3.1998, that the land with the abandoned building was handed to the developer for development, that the same was demolished, that the entire block of the abandoned

building was claimed as a short term capital loss and that this short term capital loss had been debited to the profit and loss account. The assessee further stated that they never claimed any depreciation on the land, that no assessee can make a claim of depreciation on the land, that in the depreciation statement also, the description given was with reference to a building only, that no depreciation had ever been claimed in respect of the land, as the land never depreciates and the land only appreciates and that the capital gains arise on sale of the land. The assessee further contended that in the depreciation schedule, nowhere a land is shown as asset eligible for depreciation and that there is no rate prescribed for allowing depreciation on land.

12. Therefore, the Assessing Officer is not correct in stating that the land sold is a short capital asset, on which, depreciation had been claimed.

13. Further, referring to the development agreement, it was contended that the agreement clearly stated that the land alone had been the subject of development and that the building in the land had been demolished.

14. The Assessing Officer was of the view that the assessee did not produce sufficient records to establish their contention that no depreciation was claimed on the land, but concluded that in the absence of any satisfactory reply supported by documents, the provisions of Section 50 of the Act squarely became applicable to the assessee's case. The said finding was confirmed by the CIT (A) as well as the Tribunal.

15. An identical issue came up for consideration before the Division Bench of this Court in the case of CIT Vs. Union Co. (Motors) Ltd. [reported in (2006) 283 ITR 0445]. In the said case, the assessee owned an extent of land in Bangalore with an equivalent built up area and the same was treated as a business asset and depreciation was claimed. The assessee therein sold the property and claimed the gains arising therefrom as long term capital gains. The Assessing Officer treated the same as short term capital gains under Section 50 of the Act on the ground that consolidated value was given to the land and building and no break-up was possible. Accordingly, the difference between the WDV and the sale consideration was treated as short term capital gains. On appeal before the CIT (A), the finding was set aside noting that the purchaser of the property in the said case had sought permission to demolish the superstructure, that there was no value for the building and that consequently, what remained was only the land, which was not a depreciable asset, as no depreciation could be taken on the land and it was held that the provisions of Section 50 of the Act had no application to the case of the assessee therein.

The said finding of the CIT (A) was confirmed by the Tribunal. Challenging the same, the Revenue preferred an appeal before the Division Bench of this Court. The substantial question of law, which was framed for consideration in the said case, was as to whether the Tribunal was right in holding that the capital gains arising on the sale of land and building, on which, depreciation had been claimed, would not be hit by the provisions of Section 50 of the Act.

16. We find that the substantial question of law, which was framed for consideration in the case of Union Co. (Motors) Ltd., is identical to question No.1 framed in this appeal. The said question was answered in favour of the assessee following the earlier decision in the case of ACIT Vs. Raka Food Products [reported in (2005) 277 ITR 261 (Mad.)]. The operative portions of the judgment in Union Co. (Motors) Ltd., read as follows :

"5. This Court in Assistant Commissioner of Income Tax Vs. Raka Food Products (277 ITR 261), interpreting the scope and applicability of Section 50 of the Act in a transaction relating to the land and building, of course along with machinery therein, treated the said transaction as a long term capital gains and held as follows:

"Land is not a depreciable asset. Section 50 of the Act deals only with transfer of depreciable assets. Once the land forms part of the assets of the undertaking and the transfer is of the entire undertaking as a whole, it is not possible to bifurcate the sale consideration to a particular asset. As already observed above, Section 50 of the Act applies only when depreciable assets alone are transferred."

6. It is, therefore, a settled law that even though the transaction involved land and building, once the land forms the assets of the undertaking, the transfer is of entire undertaking as a whole and it is not possible to bifurcate the same, as suggested by the assessing officer in the instant case. All the more, in the instant case, the fact remains that the purchaser had applied for demolition of the building and also demolished the building, which was taken into consideration by the Commissioner and the Tribunal, while arriving at a conclusion that Section 50 of the Act is not attracted, as, under the facts and circumstances of the

case, it is clear that the sale consideration made by the purchaser is only for the land, since the building had no value and therefore, got demolished.”

17. In our considered view, the above decision is a straight answer to the case of the Revenue. The Revenue does not dispute the fact that land is not a depreciable asset and also the legal position that Section 50 of the Act deals only with transfer of depreciable assets.

18. The case before us is a better case on facts than the case of Union Co. (Motors) Ltd., wherein the purchaser had applied for demolition of the building and subsequently demolished whereas in the case of the assessee herein, the building had already been demolished in terms of the conditions contained in the joint venture development agreement.

19. The learned Senior Standing Counsel for the Revenue places reliance on the decision of the High Court of Bombay in the case of Smt. Meena Pamnani Vs. CIT, Mumbai [reported in (2018) 404 ITR 548]. We have perused the facts of the said case wherein the case pertained to an individual assessee for the assessment year 1991-92 and she was carrying on weaving work on job basis in her three concerns. There were eight looms in M/s.Gitanjali Silk Mills and four each in the other concerns. It was the case of the assessee that the looms of M/s.Gitanjali Silk Mills were operated from gala No.210 and the other looms of the sister concerns were operating from gala No.211. In the background of these facts, the Court held that the case was distinct, that no claim for depreciation was in issue and that the question of thrusting it upon the assessee did not, therefore, arise.

20. The decision in Smt. Meena Pamnani is wholly inapplicable to the facts of the present case and hence, it does not render any assistance to the case of the Revenue.

21. Therefore, we find that substantial question of law No.1 framed for consideration is fully covered by the decision in the case of Union Co. (Motors) Ltd. Accordingly, substantial question of law No.1 is answered in favour of the assessee and against the Revenue.

22. The second substantial question of law pertains to loss of sale of shares. The Assessing Officer found that the assessee had not filed proper details. The Assessing Officer gathered some information from M/s.Aditya Securities under Section 133(6) of the Act. But, what was furnished was only a ledger account and the details of the contract notes, purchase/sales, scrip wise, brokerage, credit extension given to the assessee could not be provided by the assessee to the Assessing Officer.

23. Further, the Assessing Officer found that the depository participatory client name was furnished as Ritu Kumar, who was not the assessee. Based on the said information, the Assessing Officer took the view that the shares have not been transferred and accordingly, treated the transaction as speculative. This finding was confirmed by the CIT(A) and while doing so, he took note of Securities and Exchange Board of India Regulations, 1993 and held that the assessee had not claimed short term capital loss on the sale of shares without proving that the shares were purchased in the name of the assessee and sold by the Fund Manager on behalf of the assessee. The transactions having been found to be not verifiable, the CIT (A) concurred with the view taken by the Assessing Officer. This finding was affirmed by the Tribunal. When the assessee has not been able to prove as to why the transaction in shares should not be treated as speculative transaction, we find no reason to interfere with the concurrent finding of facts recorded by the Assessing Officer as confirmed by the CIT (A) as well as the Tribunal.

24. In the assessment order, the Assessing Officer has taken note of the decision of the Hon'ble Supreme Court in the case of Davenport & Co. Pvt. Ltd. Vs. CIT [reported in (1975) 100 ITR 715] wherein the Hon'ble Supreme Court concluded that the words 'actual delivery' in Explanation (2) to Section 24 of the Income Tax Act, 1922, which corresponds with Section 43(5) of the 1961 Act, held to mean real as opposed to notional delivery. The Hon'ble Supreme Court pointed out that for income tax purposes, speculative transaction means what the definition of the expressions in Explanation (2) says. Whether a transaction is speculative in the general sense or under the Contract Act is not relevant for the purpose of the said Explanation and the Explanation does not invalidate speculative transactions, which are otherwise legal, but gives a special meaning to that expression for the purposes of income tax only.

25. Thus, in the absence of any evidence produced by the assessee to indicate that there were, indeed, transactions of purchase and sales of shares by the assessee, the Assessing Officer rejected the contention of the assessee and held that the purported loss of sale of shares is a speculation loss and cannot be set off against other gains except gains, if any, on any other speculation business as envisaged under Sub-Section (1) of Section 73 of the Act. Thus, we find that the reasons assigned by the Assessing Officer as confirmed by the CIT (A) as well as the Tribunal are perfectly legal, valid and do not call for any interference. Accordingly, substantial question of law No.2 is answered in favour of the Revenue and against the assessee.

26. In the result, the above tax case appeal is partly

allowed. Substantial question of law No.1 is answered in favour of the assessee and against the Revenue. Substantial question of law No.2 is answered in favour of the Revenue and against the assessee. No costs.

-s/d-
Assistant Registrar (CS-IX)

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Sub-Assistant Registrar

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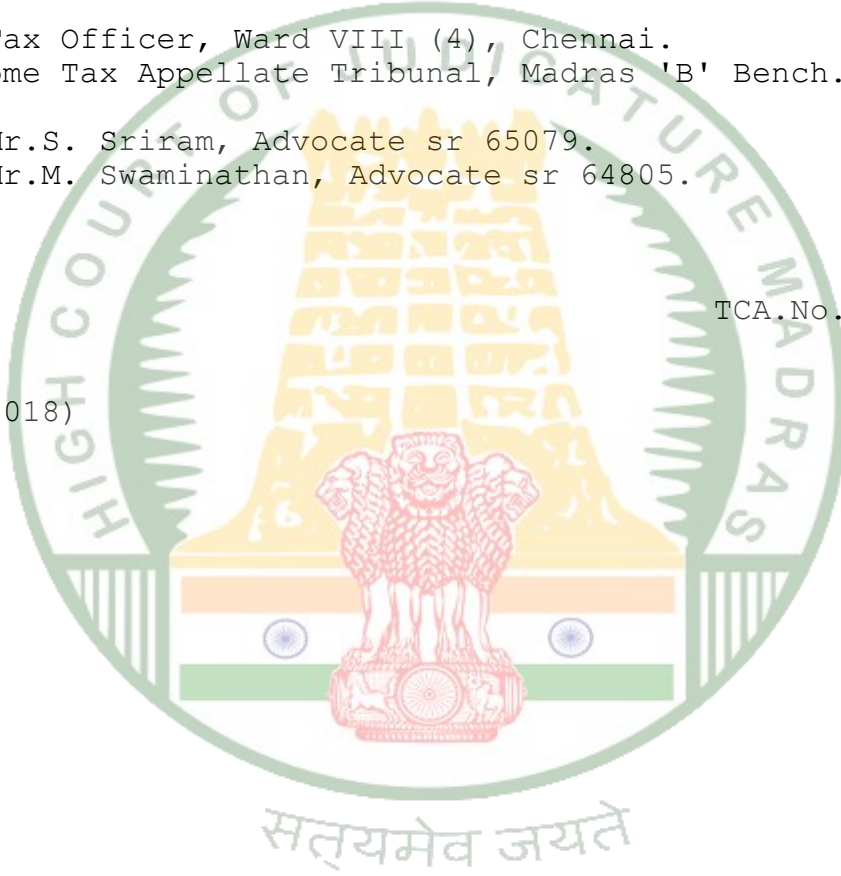
1. Income Tax Officer, Ward VIII (4), Chennai.
2. The Income Tax Appellate Tribunal, Madras 'B' Bench.

+1 CC to Mr.S. Sriram, Advocate sr 65079.

+1 CC to Mr.M. Swaminathan, Advocate sr 64805.

TCA.No.143 of 2009

VSNII (CO)
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