IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated : 19.07.2018

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THE HONOURABLE MR. JUSTICE M.M.SUNDRESH
and
THE HONOURABLE MR. JUSTICE N.ANAND VENKATESH

T.C.(A). No.858 of 2010

Commissioner of Income Tax - I
Coimbatore. .. Appellant

vs.

M/s.Bafna and Associates,
162, Ponnurangam Road,
R.S.Puram, Coimbatore. .. Respondent

Appeal filed under Section 260A of the Income Tax Act, 1961 against the order of the Income Tax Appellate Tribunal "D" Bench, Chennai dated 14.06.2005 passed in I.T.A. No.724/Mds/2000.

against the order of the Commissioner of Income Tax (Appeals)-I, Coimbatore dated 13.10.2005 made in Appeal No.333/04-05.

against the order of the Income Tax Officer, Ward-II(3), Coimbatore dated 27.03.2001 made in PAN/GIR.No.B-312/Ward-II(3).

against the order dated the Commissioner of Income Tax, 67A, Race Course Road, Coimbatore, dated 02.03.2000 made in C.No.1416 (08)/99-2000.

For Appellant : Mr.T.R.Senthil Kumar and Ms.K.G.Usharani

For Respondent : Mr.Subbaraya Aiyar

JUDGMENT

(Judgment of the Court was delivered by M.M.SUNDRESH, J.)

The Revenue has filed this appeal by formulating the following substantial questions of law in respect of the block period 01.04.1990 to 14.11.2000:

""1. Whether on the facts and in the circumstances of the case, the Income Tax Appellate Tribunal was right in holding that the assessee was not a promoter of flats and the income could be estimated only at 8% of the receipts as per the provisions of Section 44AD of the Income Tax Act, ignoring the factual findings of the Assessing officer in the order u/s 143(3) passed on 28.10.2004 to the effect that the assessee was only a promoter of flats and not a civil contractor and the provisions of Section 44AD were not applicable?

2. Whether on the facts and in the circumstances of the case, the Income Tax Appellate Tribunal was right in impliedly accepting the assessee's false averment that the Assessing Officer had given a finding in order u/s 143(3) dated 28.10.2004 that the assessee was not a promoter of flats, whereas the actual finding of the Assessing officer was that he was only a promoter of flats?

3. Whether on the facts and in the circumstances of the case, the Income Tax Appellate Tribunal was right in passing an appellate order against the order of the Commissioner of Income tax u/s 263 when the appeal against the same order had been disposed of on the basis of the same appeal filed by the assessee by its appellate order dated 29.05.2003 wherein the Tribunal had disposed of the appeal giving a direction to the assessee to produce evidence that he was not a promoter of flats?

4. Without prejudice to the above questions, assuming that the Tribunal's order is based on the assessee's Miscellaneous Petition requesting for recalling the earlier order dated 29.05.2003 whether on the facts and in the circumstances of the case, the Income Tax Appellate Tribunal was right in recalling the earlier order and passing a totally different order contrary to the law settled by various judicial decisions to the effect that the Tribunal could only rectify mistakes apparent from record while exercising powers u/s 254(2) of the Income Tax Act and could not recall its earlier order and pass a fresh order reviewing the earlier order?"

2.Heard the learned counsel appearing for the appellant and the learned counsel appearing for the respondent.

3.Learned counsel appearing for the appellant submits that the issue involved in this appeal viz., low tax effect has already been considered by this Court in T.C.A. No.1528 of 2007 on 06.06.2018 and the following order has been passed:

> "3. It may not be necessary for us to decide the substantial question of law framed for consideration, on account of the low tax effect in this appeal. This issue was considered by us in the case of Commissioner of Income Tax vs. N.Meenakshisundaram in T.C.(A) Nos.868 & 869 of 2008 dated 23.04.2018, by taking note of the Circular Instructions issued by the Central Board of Direct Taxes (CBDT) and also taking note of the submissions of the Revenue, the relevant portions of which are quoted hereunder:
>
> > "10. An argument was advanced by the learned Senior Standing Counsel for the Revenue that the circular can have effect only, while filing the appeal and not while hearing of the appeal and would have no impact on the appeals, which are admitted and pending. However, in the Circular issued in the year, 2015, it has been made clear that, it will apply to pending appeals as well. In respect of the earlier circulars, it would be relevant to take note of the decision of the Hon'ble Supreme Court in Mathew M. Thomas Vs Commissioner Of Income-Tax [(1999) (III) ELT 4 SC] wherein, the Hon'ble Supreme Court, while considering the effect of Circular No.445, dated 16.05.1986, pointed out that Circular No. 455 dated 16.5.1986 issued by the C.B.D.T. is applicable to all pending proceedings which have not attained finality under Section 269 I of the Act as defined in the explanation to the said Section.
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> > ....
> >
> > 14. Therefore, the Circular has to be understood as part of the litigation policy of the Government of India to reduce the litigation and to bring down the number of Appeals, which are pending before the Court and also ensure that the Appeals are not preferred by the Department without proper examination of the case on merits. ....
> >
> > 15. As per the Circular/Instruction issued by CBDT, the present Appeal should be not pressed by

the Revenue. If, at the time of filing of the Appeal, decision has to be taken whether to file an Appeal or not and the Authority by due application of mind and bearing the two caveats laid down by the Hon'ble Supreme Court, in Surya Herbal Ltd., case (supra) should take a decision. In cases, where, the Appeals are pending before the Court, appropriate Officer has to take a decision. In the instant case, it appears that, no such specific instruction is issued to Mr.M.Swaminathan, the learned Senior Standing Counsel to withdraw the Appeal, nor, can we compel the learned counsel to withdraw the Appeal.

16. Having held that the Circular issued by CBDT is applicable to the case on hand and the tax effect being less than the threshold limit prescribed in the Circular, we dismiss the present Appeal by applying the law laid down by the Hon'ble Supreme Court, in Surya Herbal Ltd., case (supra), as the two caveats mentioned thereunder does not arise in the instant case."

4.By applying the above decision, we dismiss this tax case (appeal) on the ground of low tax effect and in terms of the above referred decision, leave the substantial question of law, which has been framed for consideration. No costs."

4.In such view of the matter and in view of the circular issued by the Central Board Direct Taxes in Circular No.21/2015 dated 10.12.2015, this tax case appeal is dismissed on the ground of low tax effect, leaving the substantial questions of law open, which have been framed for consideration. No costs.

Sd/-
Assistant Registrar(CO)

//True Copy//

Sub Assistant Registrar

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To

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

2. The Commissioner of Income Tax (Appeals)-I,
Coimbatore

3. The Income Tax Officer,
Ward-II(3), Coimbatore

4. The Commissioner of Income Tax,
67A, Race Course Road, Coimbatore.

+1cc to Mr.T.R.Senthil Kumar, Advocate, S.R.No.48246
+1cc to Mr.Subbaraya Aiyar, Advocate, S.R.No.48772

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SVN(CO)
CS/01/08/18