IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 28.02.2019

CORAM

THE HON'BLE DR.JUSTICE VINEET KOTHARI
AND
THE HON'BLE MR.JUSTICE C.V.KARTHIKEYAN

Tax Case Appeal No.220 of 2007

Commissioner of Income Tax
Coimbatore. Appellant

Vs.

Shri.R.N.Jayaprakash Respondent

Tax Case Appeal filed under Section 260A of the Income Tax Act, 1961 against the order of the Income Tax Appellate Tribunal, Madras 'B' Bench, Chennai, dated 30.06.2006 made in I.T.(SS) A.No.71/Mds./02.

For Appellant : Mr.T.R.Senthilkumar
Assisted by
Ms.K.G.Usha Rani
Senior Standing counsel

For Respondent : Mr.R.Vijayaraghavan
for Mr.Subbaraya Iyer
Mr.Padmanabhan

J U D G M E N T

(Judgment of the Court was delivered by DR.VINEET KOTHARI,J)

The Revenue has filed this Appeal under Section 260 A of the Income Tax Act, 1961, aggrieved by the order passed by the Income Tax Appellate Tribunal on 30.06.2006, partly allowing the Assessee's Appeal against the order passed by the Assessing Authority viz., Deputy Commissioner of Income Tax on 28.03.2002 for the Block Assessment periods 1986-1987 to 1995-1996.

2. The relevant observations of the Tribunal are quoted below:

"27.Based upon the facts of the case as discussed in preceding paragraph we hold that, in the remanded proceedings, the basic materials on which assessment was framed afresh were the same which were already there and considered by this Tribunal in the earlier round of appeal. These were considered by the Tribunal as not sufficient for making any addition under the Income Tax Act. Respectfully following the precedent as emanating from the Hon'ble jurisdictional High Court judgment cited supra, we cannot take any view which is divergent to the view earlier taken by the Tribunal.

28. As regards the plea of the learned Departmental Representative that the matter may again be remanded to the files of the Assessing Officer, we do not find any merit in it. The matter has already once been remanded by the Tribunal. Six years have elapsed in between, the *remission has filed to serve the purpose. In this regard, we draw support from third member decision in the case of Assistant Commissioner of Income Tax Vs.Anima Investment Ltd. (2000) 73 ITD 125 for the proposition that,*

"The powers of the Tribunal in the matter of setting aside an assessment are large and wide, but these cannot be exercised to allow the Assessing Officer an opportunity to patch up the weak part of his case and to fill up the omission. A party guilty of remissness and gross negligence is not entitled to indulgence being shown.

Apart from the aforesaid which involved an addition of Rs.1 crore, the learned Deputy Commissioner of Income-Tax has further made the addition of Rs.6,27,850/- as follows:-

Assessment year	
1990-91	*Rs.2,16,274/-*
1994-95	*Rs.2,67,200/-*
1995-96	*Rs.1,44,280/-*

For addition for the Year 1990-91, the Deputy Commissioner of Income Tax has noted the assessee has not made any objection for the addition. For the next two additions, the Deputy Commissioner of Income Tax has noted that,

> *"The returns of income for the two years have been filed by the assessee after the date of search and after the expiry of the statutory time limit allowed under section 139. The decision of the Hon'ble*

Madras High Court in the case of V.Noorsingh Vs. UOI 105 Taxman 101 MAD is squarely applicable to the facts of the present case."

30. Considering the issue involved in this regard, we hold that the aforesaid addition by the learned Deputy Commissioner of Income Tax are on terra firma. Since the Return of Income for assessment years 1994-95 ad 1995-96 were filed after the date of search and beyond the time limit allowed u/s 139 the assessee's claim to treat the same as disclosed cannot be countenanced. Hence, the addition to the extent of Rs.6,27,850/- is countenanced.

In the result, the assessee's appeal is partly allowed."

3. The Assessing Authority, while imposing the tax on the Assessee for the block period 1994-1995 and 1995-1996, on account of the search conducted in the case of the Assessee, after the remand made by the Tribunal vide order dated 02.3.2000 in the first instance had passed the following order:

"13-8.In the light of the above discussion the assessee's figure of net profit per saree net profit per dhoty and the total profits that could have been earned determined at Rs.1.30 Rs.1.10 and Rs.50,99,778/- in his letter dated 21.03.2002 have been proposed to be not acceptable.

13-9. During the proceedings under Section 158BG, various issues arising in this case were discussed. As a result a further reduction of Rs.2.00 crores is given from the originally estimated net income of Rs.4.00 crores. Accordingly the assessment is completed as under:

13-10. It is therefore held that the net profit from the 14 concerns, after allowing a fair and reasonable deduction for expenses would be Rs.2.00 crores. The assessee's 50% share would therefore work out to Rs.1.00 crore.

14. For the above reasons, I held that the assessee's arguments relating to his taxability of the income from the 14 concerns and the proportionate share of profits to be assessed in his hand as an alternate argument are not acceptable and they are accordingly rejected. As discussed above, it is held that the profits arising out of the business transactions of the 14 concerns are rightly assessable in the hands of the assessee and Shri.T.Devanathan jointly and that assessee's share of profit therefrom is estimated at 50%. The assessee's 50% share of quantum of net income after allowing deductions for all expenses is quantified at Rs.1.00 crore as discussed above.

15.1. In the proposal letter issued to the assessee, the assessee's objections, it any, were called for to repeat the following additionals made in the block assessment completed earlier relating to the asst.years 1990-91, 1994-95 and 1995-96 falling within the block period.

Asst. year	
1990-91	Rs.2,16,274/-
1994-95	Rs.2,67,200/-
1995-96	Rs.1,44,280/p

15.2. In his letter dated 21.03.2002 the assessee has not raised any objection for the addition of Rs.2,16,274/- for the asst. year 1990-91. For the assessment years 1994-95 and 95-96, the assessee has stated that he has already filed the relevant years returns and paid taxes thereon has also objected to the assessment of the income admitted in these belated returns of income treating it as undisclosed income and cited three decisions of Appellate Tribunals.

15.3.The date of search in TNTC is 13.2.1996, consequent to which proceedings and under 158BD were initiated in the assessee's case. The returns of income for the two years has been filed by the assessee after the last of search and after the expiry of statutory time limit allowed under Section 139. The decision fo the Hon'ble Madras

High Court in the case of Noorsingh vs.UCI 105 Taxman 101 MAD is squarely applicable to the facts of the present case. The assessee's objections in this regard are therefore overruled.

15.4. The total amount of Rs.6,27,850/- relating to the above three assessment years falling within the block period is therefore added and assessed in this set aside assessment.

16. The total undisclosed income relating to the block period is therefore computed as under:

Asst. year	
1990-91	*Rs. 2,16,274/-*
1993-94	*Rs.100,00,000/-*
1994-95	*Rs. 2,67,200/-*
1995-96	*Rs. 1,44,280/-*

Total income of the Block period	*Rs.1,06,27,850/-*
Income-tax thereon at 50%	*Rs. 63,76,710/-*

This should be paid as per demand notice and challan enclosed.
This order is issued with the approval of the Commissioner of Income-tax, Central III, Chennai."

4. The learned counsel for the Assessee brought to our notice that as far as criminal prosecution of the Assessee is concerned, the High Court has acquitted the Assessee along with two others in Crl.A.Nos.323 to 325 of 2009 vide its order dated **06.03.2008** with the following observations:

*"32.It is to be noted that at the stage of further investigation **no steps had been taken to find out whether any firms were fictitious or not and no additional witnesses examined**. It is emphasized by*

the learned senior counsel that it is very convenient for the prosecution to have located as to where the demand drafts and cheques sent by TNTC had been encashed and could have very well established the identity of the persons concerned in 14 firms. In the above stated circumstances, it is pointed out that the prosecution has miserably failed to substantiate the charge of the firms being fictitious and that A2 and A3 had committed the offence of forgery by introducing these persons to the bank. Prosecution has not come forward to prove the fact by way of adducing expert opinion as to who had signed on behalf of the 14 firms for its account opening forms.

33.In the absence of any conclusive evidence that 96, Luz Church Road, Mylapore was the address of 14 firms, the charge of forgery as against A2 and A3 has necessarily been failed. One another reason for coming to this conclusion is that in the agreement the address given by the firms are different than 96, Luz Church Road, Mylapore. There has been no investigation to this effect either from the neighbour or from any of the departments that 96 Luz Church Road, Mylapore was in exclusive possession of A2 and therefore, charge against him must necessarily fail.

34.In order to establish loss to the Government, the Investigating Officer had filed statements IIA, IIB and IIC along with the charge sheet though it was not brought in evidence to show as to how much was the loss.

35.Further, in order to establish the fact that the sarees and dhoties supplied by 14 firms at inflated rates and inferior material, the prosecution relied on the evidences of PW.70, 71, 73, 75, 89, 90 and 48 and Ex.P57 and Mos. 1 and 2.

36.Regarding this non-examination of the one Balachandar from whom Mos 1 and 2 were seized coupled with PW.48 admission that no carbon dating test was performed to verify the age of Mos.1 and 2 is fatal to the prosecution case. The learned counsel for the appellant would submit that PW.70, 71, 73 and 74 supplied the materials in EX.P57 through PW.89 and 90 who in turn supplied materials to 2 of the 14 firms. However, PW.89 and 90 specifically stated that sarees and dhoties supplied to 2 of the firms were not sarees and dhoties brought from the above witnesses.

37.According to the learned Government Advocate (Crl.Side), he would submit that statements 11C denotes the delays in supplying of sarees dhoties after the last date before which they were to be supplied which was 20.02.1993. Hence the penalty of Rs.8 per day for sarees and Rs.5 per day for dhoti should be have been levied thereby causing wrongful loss to the TNTC.

38.For this, the learned counsel appearing for the appellant would submit that further supply after 28.02.1993 were made on the direct orders of the Director of Handlooms nodle agency to the supplier in certain districts, where Co-optex was unable to supply *and the defence relied on Ex.D1 and D2 for the same. After viewing ExD1 and D2 and with no other evidence supporting the prosecution other than Investigating Officer's statement that there was a delay in supply, **the contention of the prosecution is not acceptable.** The prosecution further submitted that EMD should have been fortified. For that the learned counsel appearing for the appellant submit that there was no clause in Ex.P-15 which is the agreement between TNTC and 14 firms to forfeiture of EMD. Therefore, the statements relied on by the Investing Officer, IIA, IIB and IIC are not sustainable.*

*39.In order establish the fact that sarees and dhoties supplied during Pongal 1993 are inferior, the prosecution relied on Mos. 1 and 2 which were said to have been recovered during the year 1996. **Whereas, the supply of free dhoties and sarees are concerned during 1993.** Moreover, **the prosecution has not come forward to examine one Balachandran from whom Mos. 1 and 2 said to have been seized**. Further, no evidence has been let in by the prosecution either in the status of VAO, Tahsildar or beneficiaries that were supplied with inferior quality of sarees and dhotis and therefore, the charge of loss to the Government is only hypothetical in nature and there is not even an iota of evidence with regard to the loss suffered due to the supply of substandard material.*

40.On a careful consideration of reasons stated *above and also* ***considering the infirmities found in the prosecution case, this Court is of the view that the conviction and sentence passed by the learned XIII*** *Additional/Special Judge in Spl.C.C.6 of 1997, dated 15.03.2001* ***against the appellants is not sustainable in law and hence the same is liable to be set aside.*** *The bail bonds if any shall stand cancelled.*

41.Accordingly, all these appeals are allowed."

5. The present Income Tax Appeal by Revenue was admitted by the Co-ordinate Bench of this Court on the following substantial questions of law:

"*(i) Whether in the facts and circumstances of the case, the Tribunal was right in holding that the information gathered by another investigating agency and confirmed by the Special Court as not sufficient basis for making addition under the Income Tax Act?*

(ii) Whether in the facts and circumstances of the case, the Tribunal was right in deleting the entire addition of undisclosed income of Rs.1.06 Crores in the assessee's hands on the ground that the same material was available even prior to the remand, failing to see that the order of the Special Court was available to the assessing officer after remand, which confirms the involvement of the assessee in the textile scam?

(iii) Whether in the facts and circumstances of the case,

the Tribunal was right in holding that the entire addition should be deleted as the assessment order was not in accordance with the earlier remand order of the Tribunal?".

6.The learned counsel for the Assessee Mr.R.Vijayaraghavan submitted that the Tribunal has rightly set aside the Assessment Order and the additions made in the hands of the Assessee firm as the Assessment authority has failed to give any finding of fact against the Assessee that 14 alleged bogus firms are belonging to the Assessee only and the transactions made in the name of said firms related to the Assessee with regard to sale of sarees and dhotis announced by the State Government in the year 1992 related to him and the alleged loss caused to the State Government in the said Scheme formed the income earned by the Assessee during the said block Assessment period.

7. The learned counsel for the Revenue however disputed the impugned order of the Tribunal and further urged that the acquittal of the Assessee in the Criminal Proceedings by the High Court does not amount to per se setting aside of the additions made to the income of the Assessee and the learned Tribunal has failed to appreciate the facts on their own during the reassessment proceedings after the remand by the

learned Tribunal on the first instance on 02.03.2000.

8. The learned counsel for the Revenue submitted that the request of remand to the Appellate authority again by the Tribunal was wrongly brushed aside by the learned Tribunal as per the order quoted above.

9. Having heard the submissions of the learned counsel for the parties, we are of the opinion that the learned Tribunal being a fact finding body has erred in dismissing the appeal without appreciating the facts in detail on its own and in rejecting the materials before it. The Tribunal also erred in only relying upon the earlier order passed by the Income Tax Appellate Tribunal by which the matter was remanded vide order **02.03.2000** and the learned Tribunal while passing the subsequent order impugned before us on 30.06.2006 has taken note of the earlier remand order but still not accepting the request of the Revenue to remand the present case also back to the Assessing Authority, in case the Tribunal felt that the findings by the Assessing Authority were not sufficient.

10. As far as acquittal of the accused persons in the Criminal Proceeding is concerned, it cannot be said to be amounting to automatic deletion of income, added in the hands of the Assessee in the present

case under the Income Tax Act. Two proceedings, one under the Income Tax and another in Criminal prosecution operate in different fields and there is no doubt that the material collected during the course of criminal proceeding can also be used by the Authorities in the Income Tax proceedings also. But, the question is that the Appellate Authority should arrive at its own independent findings of fact on the basis of such material after issuing notice to the Assessee, giving him an opportunity to controvert the material against him. Therefore, mere acquittal of the Assessee along with other two co-accused by High Court, as quoted above cannot by itself result in setting aside of the assessment made by the Assessing authority in the present case.

11. In these circumstances we are of the opinion that the matter again deserves to be remanded back to the Assessing Authority for fresh enquiry in the matter. It is needless to say that the Assessing Authority will arrive at its own independent findings after considering the adverse materials available on its record giving to Assessee a due and reasonable opportunity of controverting the same and the Assessing authority may arrive at an independent findings of fact on the basis of said material. As far as bogus firms are concerned, the Assessing authority should give the finding of facts relating the transactions in the name of alleged bogus firms

to the Assessee before it. Therefore, we leave it free for the Assessing authority to undertake fresh assessment proceeding again, uninfluenced by the observations made by the Tribunal in the impugned order or the fact that the Assessee along with co-accused has been acquitted by the High Court, in the Criminal case.

12. Accordingly, the appeal of the Revenue is disposed of with the aforesaid observations with the remand of the case to the Assessing authority and the questions of law are therefore answered accordingly. No order as to costs.

(V.K.,J.) (C.V.K.,J.)

28.02.2019

Index : Yes/No
Internet : Yes/No

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To

The Income Tax Appellate Tribunal,
Madras 'D' Bench, Chennai.

DR.VINEET KOTHARI, J.
and
MR.C.V.KARTHIKEYAN, J.

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TCA No.220 of 2007

28.02.2019