

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on : 11.07.2019	Pronounced on : 05.08.2019
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CORAM :

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

Tax Case Appeal No.117 of 2009

The Commissioner of Income Tax,
Chennai.

.. Appellant

Vs.

M/s.India Cements Ltd., Chennai - 9.

.. Respondent

Prayer :

Tax Case Appeal filed under Section 260-A of the Income Tax Act, 1961 against the order of the Income Tax Appellate Tribunal Madras 'C' Bench, Chennai dated 30.05.2008 in I.T.A.No.582/Mds/2005 for the Assessment Year 1996-97. against the Order of Commissioner of Income Tax (Appeals)-XI, 121 Mahatma Gandhi Salai, Chennai-34, made in ITA.No.Tr.No.215/ITA.NO.242/04-05 date 30.12.2004 for the Assessment year 1996-97.

against the order of the Assisstant commissioner of Income Tax, Company Circle II(3), 121, Mahatma Gandhi road, Chennai -34, made in G.I.No./P.A.NO.IXI-/AAAC11728P for the Assessment Year 1996-97.

against the order of Joint Commissioner of Income Tax, Special Range II, Chennai made in PAN/GIR.No.7-I dated 15.02.1999 for the Assessment year 1996-97.

For Appellant : Mr.Karthik Ranganathan, SSC &
S.Rajesh

For Respondent : Mr.Vikram Vijayaraghavan for
M/s.Subbaraya Aiyar Padmanabhan

* * *

J U D G M E N T

T.S.Sivagnanam, J

This appeal, filed by the Revenue under Section 260-A of the Income Tax Act, 1961 ('the Act' for brevity), is directed against the order dated 30.05.2008 passed by the Income Tax Appellate Tribunal Madras 'C' Bench (for short, the Tribunal) in ITA. No.582/Mds/2005 for the Assessment Year 1996-97.

2. The appeal was admitted on 31.03.2009 on the following substantial questions of law:

"1. Whether on the facts and circumstances of the case the Income Tax Appellate Tribunal's order in admitting the assessee's plea under Rule 27 which has jeopardised the interest of the revenue is justified in law especially when the assessee has neither filed an appeal nor a cross objection before the Tribunal?

2. Whether on the facts and circumstances of the case the Income Tax Appellate Tribunal is right in law in traversing beyond the scope of Section 254 of adjudicating on an issue of (validity of reopening of assessment) when the CIT(A) has not decided that matter?

3. Whether the Rule 27 of the Income Tax Tribunal Rules would entitle a respondent who has neither preferred an appeal nor cross objections to relief on a point decided in favour of the appellant by the lower appellate authority? and

4. Whether on the facts and circumstances of the case the Income Tax Appellate Tribunal is right in law in upholding that the CIT(A)'s order allowing relief under Section 80 I to the assessee on a sum of Rs.9.89 Crores especially when the assessing officer has pointed out before the CIT(A) that the assessee is not at all entitled to relief under Section 80 I on account of loss in business?

3. The assessee is engaged in the manufacture of cement and for the assessment year under consideration, i.e. 1996-97, the assessee filed their return of income on 28.11.1996 admitting "Nil" income. The assessment was completed under Section 143(3) of the Act determining the taxable income at 'Nil' and gross total income at Rs.9,89,79,212/-. The assessee claimed deduction under Section 80-I of the Act in respect of its unit at Sankar Nagar. The Assessing Officer issued a notice dated 25.02.2003

under Section 148 of the Act on the ground that the assessee, while claiming deduction, had not excluded other income from the profit of the business, which was eligible for deduction under Section 80-I of the Act and further, the assessee had set off the deduction under Section 80-I of the Act against other income also, which was not allowed. Subsequently, a notice under Section 143(2) of the Act was served on 07.08.2003 and the assessee was heard in person.

4. The assessment was completed by order dated 31.03.2004 under Section 143(3) read with Section 147 of the Act and in doing so, the Assessing Officer pointed out that it was noticed that other income relating to Sankar Nagar Unit was Rs.6,16,51,948/-, that while computing the deductible amount under Section 80-I of the Act, the assessee had excluded certain items of other income and that the entire other income had not been excluded from the profit of the business to derive the deductible amount under Section 80-I of the Act. The Assessing Officer held that under Section 80-I of the Act, the income derived from the undertaking alone could be allowed. It was further pointed out that in case of other income, the nexus between the profits and gains and the industrial undertaking if not direct, but incidental, such income could not have been regarded as having been derived from the industrial undertaking. Thus, the Assessing Officer excluded other income while determining the deductible profit under Section 80-I of the Act.

5. Further, the Assessing Officer pointed out that assessee received dividend income from the Unit Trust of India and interest income from the then Tamil Nadu Electricity Board, that those two receipts were made out of investments and that the same should be dealt under the head "Other sources" and accordingly, restricted the allowable deduction under Section 80-I of the Act to the profit of the business. In terms of the reasons assigned in the re-assessment order dated 31.3.2004, the Assessing Officer computed the tax payable.

6. Aggrieved by such order, the assessee filed an appeal before the Commissioner of Income Tax Appeals-XI, Chennai [hereinafter referred to as "CIT(A)"]. Before the CIT(A), the assessee contested the correctness of the assessment order dated 31.03.2004 under three heads namely, (i) the relief under Section 80-I of the Act read with Section 80AB of the Act; (ii) the validity of the reopening of the assessment under Section 147 of the Act; and (iii) the liability under Section 234D of the Act. The CIT(A) pointed out that the issue relating to the relief under Section 80-I of the Act and the validity of the reopening of assessment under Section 147 of the Act, were hotly debated before him, which made him to call for two remand reports from the Assessing Officer dated 25.10.2004 and

16.12.2004, copies of which were furnished to the assessee and the assessee was heard in the matter.

7. Though the CIT(A) recorded that the issue relating to the validity of the reopening of the assessment under Section 147 of the Act was hotly contested by the assessee, the said issue was not decided by the CIT(A) for the reason that the CIT(A) rendered a decision on the relief, which the assessee was entitled to, under Section 80-I of the Act and therefore, opined that it was not necessary for him to give a finding on the validity of the reopening under Section 147 of the Act. So far as the relief claimed by the assessee under Section 80-I of the Act, the assessee succeeded before the CIT(A).

8. The Revenue, being aggrieved by the order passed by the CIT(A) dated 30.12.2004, particularly, allowing the assessee's appeal, filed an appeal before the Tribunal contending that the CIT(A) erred in holding that the assessee was entitled for relief under Section 80-I of the Act to the extent of gross total income of Rs.9.89 crores, that the CIT(A) erred in concluding that the deduction under Section 80-I of the Act should be restricted not to the profits and gains of business, but to the gross total income, which included "income from other sources", that the CIT(A) erred in concluding that the components of the gross total income could not be examined for limiting deduction under Section 80-I of the Act, that the CIT (A) failed to appreciate that when a particular item of income was not considered for computing deduction under Section 80-I of the Act, the same could not be considered for limiting the deduction under the Section 80-I of the Act and that without prejudice to the above grounds, the Revenue contended that the CIT(A) erred in rejecting the proposal for enhancement made by the Assessing Officer in the course of appeal proceedings for withdrawing the entire deduction under Section 80-I of the Act, as there was loss of business of Rs.4.12 Crores in the relevant year.

9. Before the Tribunal, the assessee contended that the CIT (A) had not gone into the correctness of the reopening under Section 147 of the Act, because the CIT(A) allowed the appeal on merits. By referring to Rule 27 of the Appellate Tribunal Rules (hereinafter referred to as 'the Rules'), the assessee submitted that they had a right to agitate the issue regarding reopening of the assessment before the Tribunal. In this regard, it was submitted that the original assessment was completed under Section 143(3) of the Act on 15.02.1999, that subsequently, a notice under Section 148 of the Act was issued on 25.02.2003, which was beyond four (4) years from the end of the assessment year, that there was no failure on the part of the assessee to disclose any material facts and that the reopening was not valid

in law. A reference was placed on the decisions of this Court in the case of CIT Vs. Elgi Finance Ltd. [reported in (2006) 286 ITR 674] and in the case of CIT Vs. Premier Mills Ltd. [reported in (2008) 296 ITR 157].

10. The Revenue, on the other hand, contended that the said issue was squarely covered in favour of the Department in the light of the decision of the Hon'ble Supreme Court in the case of Pandian Chemicals Vs. CIT [reported in (2003) 262 ITR 278].

11. The Tribunal took up for consideration the contentions advanced by the assessee that in terms of Rule 27 of the Rules, they were entitled to agitate the issue regarding the correctness of the reopening of assessment under Section 147 of the Act. After referring to Rule 27 of the Rules, it was pointed out that a plain reading of Rule 27 of the Rules would clearly show that even if the respondent had not filed any appeal or cross objection, they could still agitate the points, which were decided against them. Further, it was pointed out that if any issue was not adjudicated by the Appellate Authority, then it was deemed to have been decided against the appellant. Following the said principle, the Tribunal held that the issue of reopening, having not been decided by the CIT(A), should be taken as a decision against the assessee and that they were entitled to agitate the issue before the Tribunal, even if appeal was not filed by them.

12. With the above reasoning, the Tribunal proceeded to decide the validity of the reopening under Section 147 of the Act. After taking note of the Proviso to Section 147 of the Act, it was pointed out that if the original assessment was completed under Section 143(3) of the Act, then such assessment could not be reopened beyond four years unless and until there was a failure on the part of the assessee to disclose any material fact. The Tribunal proceeded to take note of the findings rendered by the CIT(A) on the issue regarding the relief sought for by the assessee under Section 80-I of the Act and after extracting the relevant particulars, the Tribunal held that the particulars regarding dividends and short term capital gains were clearly available before the Assessing Officer during the original assessment proceedings and that the Revenue had not brought any material before it, which was not disclosed by the assessee in the original return of income. Thus, the Tribunal concluded that there was no failure on the part of the assessee to disclose any material fact relevant for the reassessment and that the assessment could not have been reopened. Following the decisions in the case of Elgi Finance Ltd. and Premier Mills Ltd., the reopening of the assessment was annulled.

13. In our view, the Tribunal need not have proceeded further in the matter because having wholly annulled the reassessment, nothing more remains to be considered. Nevertheless, the Tribunal proceeded to take a decision on merits and affirmed the order passed by the CIT(A).

14. Challenging the order passed by the Tribunal, the Revenue preferred this appeal, which was admitted on 31.3.2009 on the aforementioned substantial questions of law.

15. The substantial questions of law framed can be bunched up together, as they pertain to the interpretation of Rule 27 of the Rules and the power of the Tribunal to decide the issue of validity of reopening of assessment, which was not decided by the CIT(A). If substantial question of law Nos.1 to 3 are to be answered in favour of the Revenue, there may be a necessity to consider substantial question of law No.4. If we take a decision against the Revenue in respect of substantial question of law Nos.1 to 3, then there would be no necessity for us to decide substantial question of law No.4. With this caveat, we proceed to consider the case before us.

16. We have elaborately heard Mr.Karthik Ranganathan, learned Senior Standing Counsel for the appellant/Revenue and Mr.Vikram Vijayaraghavan learned counsel appearing on behalf of M/s.Subbaraya Aiyar Padmanabhan, learned counsel appearing for the respondent/assessee.

17. It was argued by Mr.Karthik Ranganathan, learned Senior Standing Counsel for the appellant/Revenue that the issue relating to the validity of the reopening of assessment was not adjudicated by the CIT(A) and without filing an appeal against the said order, the assessee was not entitled to agitate the issue before the Tribunal in an appeal filed by the Department. It was further submitted that the Tribunal traveled beyond the scope of Section 254 of the Act by adjudicating the issue relating to the validity of reopening of assessment, when the CIT(A) had not decided the said issue on the merits of the matter. It was vehemently contended that the CIT(A) erred in granting relief to the assessee under Section 80-I of the Act on a sum of Rs.9.89 Crores ignoring the fact that the Assessing Officer pointed out to the CIT(A) that the assessee was not at all entitled to relief under Section 80-I of the Act on account of the loss in business. Further, it was submitted that the Tribunal ought to have taken note of the fact that the Assessing Officer had given an enhancement proposal to the CIT(A) and it should have been considered and if it was done, the deduction allowed under Section 80-I of the Act in the reassessment proceedings had to be reversed as being incorrect and against law.

18. To substantiate the stand of the Revenue that the assessee was not entitled to any relief under Section 80-I of the Act, the learned Senior Standing Counsel referred to the decisions in the cases of

- (i) CIT Vs. Seshasayee Paper and Board Limited [reported in 1997 207 80 (Madras)];
- (ii) IPCA Laboratory Ltd. Vs. Deputy Commissioner of Income Tax [reported in (2004) 135 taxmann 594 (SC)],
- (iii) CIT, Thiruvananthapuram Vs. K.Ravindranathan Nair [reported in (2007) 165 taxmann 282 (SC)];
- (iv) Liberty India Vs. CIT [(2009) 183 taxman 349 (SC)]; and
- (v) Reliance Trading Corporation Vs. ITO [reported in (2015) 61 Taxmann.com 267 (Rajasthan) (FB)].

19. Mr.Vikram Vijayaraghavan, learned counsel appearing for the respondent - assessee, while seeking to sustain the order passed by the Tribunal with regard to the validity of the reassessment, placed reliance on the decisions in the cases of

- (i) CIT Vs. Abdul Rahman Sait [reported in (2008) 306 ITR 0142 (Madras)];
- (ii) Deep Chand Kothari Vs. CIT [reported in (1998) 171 ITR 0381 (Madras)];
- (iii) Dahod Sahakari Kharid Vechan Sangh Ltd. Vs. CIT [reported in (2006) 282 ITR 0321 (Gujarat)];
- (iv) Tanmac India Vs. Deputy Commissioner of Income Tax [reported in (2016) 97 CCH 0189 (CHEN) (HC)]; and
- (v) CIT Vs. Kelvinator of India Limited [reported in (2010) 320 ITR 0561 (SC)].

20. To sustain the finding rendered by the Tribunal on the entitlement of the assessee for relief under Section 80-I of the Act, the learned counsel for the respondent/assessee referred to the decisions in the cases of

- (i) CIT Vs. Nima Specific Family Trust [reported in (2001) 248 ITR 0029 (Bombay)];
- (ii) CIT, Chennai -I Vs. M/s. TTK Pharma Limited [TCA.No.298 of 2004 dated 23.12.2009 (MHC)]; and

(iii) Synco Industries Ltd. Vs.
Assessing Officer & Anr. [reported in
(2008) 299 ITR 0444 (SC)].

21. As prefaced by us earlier, we first proceed to decide the correctness of the order passed by the Tribunal in permitting the assessee to argue the validity of the reassessment under Section 147 of the Act, which issue was not decided by the CIT(A), without filing a separate appeal challenging that portion of the order of the CIT(A) dated 30.12.2004. A decision on this issue will cover substantial question of law Nos.1 to 3.

22. In the case of Kiran Singh Vs. Chaman Paswan [reported in AIR 1954 SC 340], the Hon'ble Supreme Court held that it is a fundamental principle well established that a decree passed by a Court without jurisdiction is a nullity and that its invalidity could be set up whenever and wherever it is sought to be enforced or relied upon, even at the stage of execution and even in collateral proceedings. It was further pointed out that a defect of jurisdiction, whether it is pecuniary or territorial, or whether it is in respect of the subject matter of the action, strikes at the very authority of the Court to pass any decree and such a defect cannot be cured even by consent of parties.

23. This decision was taken note of in the case of Deep Chand Kothari, wherein one of the substantial questions, framed, was as to whether, in the proceedings initiated under Section 147(a) of the Act, the validity of the notices and proceedings taken in pursuance thereof was raised before the Income Tax Officer (ITO) and the appeal of the assessee was accepted on merits, the Tribunal was legally not right in not allowing the objection as to the jurisdiction of the ITO to initiate the notice and as to the validity of the proceedings taken in pursuance thereof to be raised? While answering the said question, it was pointed out by the Division Bench of the Rajasthan High Court that it was not in dispute that the jurisdiction of the ITO was duly challenged by the assessee before the ITO himself and also in the memorandum of appeals filed before the Appellate Commissioner, who did not touch on the said point nor decided the appeal on merits in favour of the assessee. It was held that it would be deemed that the Appellate Commissioner decided the point of jurisdiction against the assessee and the point of jurisdiction was raised before the Tribunal therein referring to Rule 27 of the Rules. It was further pointed out that Rule 27 of the Rules provides that the respondent, though he may not have appealed, may support the order appealed against on any of the grounds decided against him. Thus, it was held that the assessee was entitled to support the order of the Appellate Commissioner for not clubbing the

said two incomes on the said ground of lack of jurisdiction. The Court noted the decision in the case of CIT Vs.S.Nelliappan [reported in (1967) 66 ITR 722 (SC)], wherein it was held that the Tribunal may allow new grounds to be urged before it.

24. In the decision in the case of Dahod Sahakari Kharid Vechan Sangh, wherein one of the substantial questions of law framed for consideration was as to whether, the Tribunal was right in law in holding that it was necessary for the assessee to file cross-objection in spite of fully succeeding in appeal and therefore, it could not challenge the finding by the CIT(A), as the assessee being guilty of concealment of income and/or furnishing inaccurate particulars?

25. While considering the said question, the Gujarat High Court held that the Tribunal apparently lost sight of the fact that the assessee had succeeded before the CIT(A), that when the appeal had been allowed and the penalty levied by the Assessing Officer was deleted in entirety, there was no occasion for the assessee to feel aggrieved, that it was not necessary for the assessee to prefer an appeal and that the position in law was well settled that a cross-objection, for all intents and purposes, would amount to an appeal and the cross-objector would have the same rights, which an appellant has, before the Tribunal. It was further pointed out that in case a party, having succeeded before CIT(A), opts not to file cross-objection even when an appeal has been preferred by the other party, from that, it is not possible to infer that the said party has accepted the order or the part thereof, which was against the respondent.

26. Section 253 of the Act provides for appeal to the Tribunal. Under Sub-Section (1), an assessee is granted right to file an appeal. Under Sub-Section (2), the CIT is granted a right to file an appeal by issuing necessary direction to the Assessing Officer. Sub-Section (3) prescribes the period of limitation, within which, an appeal could be preferred. Section 253(4) of the Act lays down that either the Assessing Officer or the assessee, on receipt of notice that an appeal against the order of CIT(A) has been preferred under Sub-Section(1) or Sub-Section (2) by the other party, may, notwithstanding that no appeal had been filed against such an order or any part thereof, within 30 days of the notice, file a memorandum of cross-objections verified in the prescribed manner and such memorandum shall be disposed of by the Tribunal as if it were an appeal presented within the period of limitation prescribed under Sub-Section (3). Therefore, it transpires that a party has been granted an option or a discretion to file cross-objection.

27. It was pointed out by the Gujarat High Court that the Tribunal in the said case, had drawn the inference, which was not supported by the plain language employed by the said provision, that if the inference drawn by the Tribunal was accepted as a correct proposition, it would render Rule 27 of the Rules redundant and nugatory and it was not possible to interpret the provision in such manner and that the right granted to the respondent by the Rules could not be taken away by the Tribunal by referring to the provisions of Section 253(4) of the Act.

28. We respectfully agree with the proposition laid down in the aforementioned two decisions. The language employed in Rule 27 of the Rules is clear and it deals with cases where the respondent may support the order on the grounds decided against him. Rule 27 of the Rules states that though the respondent may not have appealed, he may support the order appealed against on any of the grounds decided against him. As pointed out by us earlier, the CIT(A) has recorded that the validity of the reassessment proceedings was hotly debated before him. However, the CIT(A) proceeded to take up the issue relating to the relief, which the assessee would be entitled to under Section 80-I of the Act and proceeded to grant the same on the close of its order and the CIT(A) would state that since the appeal has been allowed on merits under Section 80-I of the Act, there is no necessity for him to give a finding on the issue of reopening of assessment under Section 147 of the Act.

29. Thus, the CIT(A) did not adjudicate the correctness of the reassessment proceedings, which was challenged by the assessee. It is deemed that the said issue was decided against the assessee and that the assessee was entitled to canvass the said issue before the Tribunal without independently filing an appeal in the light of the Rule 27 of the Rules. Therefore, the Tribunal was right in permitting the assessee to argue on the issue relating to the validity of the reassessment proceedings.

30. Having held so, we need to consider as to whether the reassessment was validly done. The Tribunal held in favour of the assessee stating that the reassessment was bad in law. To decide this issue, we may straightaway refer to the decision in the case of Kelvinator of India Ltd., wherein the Hon'ble Supreme Court pointed out that post 01.04.1999, the power to reopen was much wider and that however, one needs to give a schematic interpretation to the words "reason to believe", failing which, Section 147 of the Act would give arbitrary powers to the Assessing Officer to reopen the assessment on the

basis of "mere change of opinion", which cannot be, per se, reason to reopen. It was pointed out that there is a conceptual difference between the power to review and power to reassess, that the Assessing Officer has no power to review, that he has the power to reassess and that reassessment has to be based on fulfillment of certain pre-conditions and if the concept "change of opinion" is removed, then in the garb of reopening the assessment, review would take place. It was held that the concept of "change of opinion" should be treated as in-built test to check the abuse of power by the Assessing Officer. Thus, it was held that after 01.04.1999, the Assessing Officer has power to reopen provided there is "tangible material" to come to the conclusion that there is an escapement of income from assessment and reasons must have a live link with the formation of the belief.

31. Bearing the aforementioned legal principles in mind, if we examine the facts of the present case, as rightly pointed out by the Tribunal, all particulars relating to dividends and short term capital gains and other particulars were available with the Assessing Officer during the assessment proceedings, which was concluded on 15.02.1999 under Section 143(3) of the Act. Furthermore, the Tribunal, on facts, recorded that the Department did not bring any material fact before it, which was not disclosed in the original return of income.

32. Even in this appeal, no such fact has been brought to our notice nor pleaded in the memorandum of grounds of appeal and presumably that is the reason why the Revenue had raised the substantial questions involving the interpretation of Rule 27 of the Rules and conveniently was not focusing on the issue as to whether the reopening of assessment was on account of change of opinion. A reading of the reassessment order dated 31.03.2004 will clearly reveal that all facts and figures were gathered by the Assessing Officer only from the original return of income filed by the assessee. There was no fresh or tangible material available with the Assessing Officer to reopen the proceedings. Therefore, we have no hesitation to conclude that the reopening of the assessment beyond four years was clearly a case of change of opinion. For all the above reasons, substantial questions of law No.1 to 3 are liable to be answered against the Revenue and consequently, it is held that the reopening of the reassessment is bad in law and is liable to be set aside.

33. Accordingly, the appeal filed by the Revenue is dismissed. The re-assessment order dated 31.3.2004 is set aside. Substantial questions of law No.1 to 3 are answered against the

Revenue. As we have answered substantial questions of law Nos.1 to 3 against the revenue, there would be no necessity for us to answer the substantial question of law No.4 and the said question is left open. No costs.

Sd/-
Assistant Registrar(CS VI)

//True Copy//

Sub Assistant Registrar

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To

1. The Commissioner of Income Tax,
Chennai.
2. The Income Tax Appellate Tribunal,
Madras 'C' Bench,
Chennai.
3. The Commissioner of Income Tax (Appeals)-II,
121, Mahatma Gandhi salai,
Chennai-34.
4. The Assistant Commissioner of Income Tax,
Company Circle II(3), 121,
M.G.Road, Chennai-34.
5. The Joint Commissioner of Income Tax,
Special Range II, Chennai.
6. The Assistant Registrar,
Income Tax Appellate Tribunal,
IIIrd Floor, Rajaji Bhavan,
Besant Nagar, Chennai-90.

+1cc to Mr.Karthik Ranganathan, Advocate, S.R.No.66557

+1cc to M/s.Subbaraya Aiyar Padmanabhan, Advocate, S.R.No.67210

Tax Case Appeal No. 117 of 2009

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