IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED :15.07.2019

CORAM :

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

Tax Case Appeal No. 344 of 2009

M/s. Sri Balamurugan Textile Processing Ltd,
126, Arts College Road,
Coimbatore - 641 018. .. Appellant

Vs.

The Assistant Commissioner of Income tax,
Company Circle I (1),
Coimbatore. .. 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 'D' Bench, Chennai, dated 05.12.2008 in I.T.A.No. 1859 of 2007 for the Assessment years 2004-05 I.T.A.No.1859/2007 against the order of the Commissioner of Income Tax (Appeals)I Coimbatore in P.A. No. AAECS5448M for the Assessment year 2004-2005 against the Assistant Commissioner of Income Tax, Company Circle I(1) Coimbatore in P.A. No./GIR No. AAECS5448M for the Assessment year 2004-2005.

For Appellant : Mr. R.V. Easwar
Senior Counsel for
J. Balachandar

For Respondent : Mr.T.R.Senthil Kumar
Senior Standing Counsel

JUDGMENT
[Judgment was delivered by T.S.Sivagnanam, J.]

This appeal by the assessee filed under Section 260-A of the 'Income Tax Act, 1961' (hereinafter referred to as 'the Act') is directed against the order dated 05.12.2008 passed by the Income Tax Appellate Tribunal Madras 'D' Bench in ITA.No.1859 of 2009 for the Assessment year 2004 -2005.

2. The appeal has been admitted on the following substantial questions of law:

> "(i) Whether, on the facts and circumstances of the case, the Appellate Tribunal was right in law in holding that the difference of Rs.2,44,96,054 in the sundry creditors account is unaccounted income invested in assets out of unaccounted income as determined by the Assessing Officer is to be assessed as unexplained cash credit under Section 68 of the Income Tax Act, 1961, as held by the learned Commissioner of Income Tax (Appeals)? And
>
> (ii) Whether on the facts and circumstances of the case, the Appellate Tribunal was right in law in holding that by mere passing of Journal entries in the books of accounts without any cash inflow whether the said sum is assessable as unexplained cash credits under Section 68 of the Income Tax Act, 1961 ?"

3. The assessee is a wholly owned subsidiary of Shri Kannapiran Mills Ltd, (hereinafter referred to as 'holding company'). The assessee filed its return of income for the Assessment year 2004-05 on 29.10.2004, admitting a total income of Rs.44,43,890/-. The assessment was completed by issuance of intimation under Section 143(1) of the Act dated 21.02.2005. Subsequently, notice dated 17.08.2005 was issued under Section 143(2) of the Act and the assessment was taken up for scrutiny. The Assessing Officer issued notice to the assessee and conducted several hearings during which the assessee furnished books of accounts, bills and vouchers and other relevant details called for by the Assessing Officer, stated to have offered necessary explanation to the queries raised by the Assessing Officer, furnished the list of creditors, etc. Upon receipt of all the records and documents, the Assessing Officer issued show cause notice dated 20.12.2006, stating that there exists difference of balance with creditors.

4. In this case, we are concerned about two of the creditors namely Raksha's Enterprises and Sri Ganesh Traders. The assessee filed its reply dated 22.12.2006 explaining difference between the balance as per books of the assessee and that of the parties. The assessee by letter dated 23.12.2006 explained journal entries made in the books of accounts of the assessee and holding company to show that there was no inflow of funds by virtue of journal entries passed in the books of accounts of

both the companies. Further in the letter dated 23.12.2006, the assessee brought out that the journal entries were immediately rectified in the next month in the books of accounts of both the companies, which falls in the next financial year, assessable for the Assessment Year 2005-06. The assessee explained by stating that the holding company made the journal entries on the assumption that purchases made by it pertains to the subsidiary company(assessee company) and later on, when, it was found that the purchases were not for the subsidiary (assessee), the holding company passed a reversal journal entries and the assessee company passed necessary journal entries incorporating the same.

5. Further the assessee's case is that the assessment for the holding company for the relevant Assessment year was an assessment passed under Section 143(3) of the Act and for the next Assessment Year, where the reversal journal entries were made, was also accepted by the Department in the hands of the holding company as the assessments were completed under Section 143(3) of the Act and the books of accounts and other relevant records were duly examined by the very same Assessing Officer namely the respondent.

6. Further, the assessee's case is that the journal entries at any point of time did not yield any increase or decrease in profits/asset or reduction of over all liabilities of both the companies. Similarly, the reversal of original journal entries made on 31.03.2004, which was reversed on 30.04.2004, did not change or affect the over all liabilities/assets or profits of both the companies. The Assessing Officer completed the assessment by order dated 28.12.2006 and came to the conclusion that the difference of Rs.2,44,96,054/- represents investment in assets out of unaccounted income and hence the difference between the creditors confirmation letter and the account of the creditors in the books of account is treated as unaccounted income without any legal or factual basis.

7. Aggrieved by such order, the assessee preferred an appeal before the Commissioner of Income Tax (Appeals)-I, Coimbatore (CIT(A)). The appeal was dismissed by an order dated 25.06.2007, against which the assessee preferred an appeal before the Tribunal, which was dismissed by the impugned order.

8. We have heard Mr.R.V.Eswar, learned Senior Counsel for Mr.J.Balachandar, learned counsel for the appellant and

Mr.T.R.Senthil Kumar, learned Senior Standing Counsel for the revenue.

9. Dispute, which the Tribunal, adjudicated was with regard to confirmation of addition amount of Rs.2,44,96,054/- under Section 68 of the Act. The Tribunal after considering the submissions on either side, took note of the decisions, more particularly, the decisions in the case of Sree Lekha Banerjee Vs. CIT [reported in 49 ITR 112 (SC)] and CIT Vs. P.Mohanakala [reported in (2007) 291 ITR 278 (SC)] and proceeded to reject the assessee's case with the following observations:

> "19. In the case before us, no explanation is forthcoming why this wrong entry was made by the subsidiary company. It is further not clarified why identical entry has been made by the holding company by debiting assessee and crediting which accounts, we do not know. But, most probably, letters of credit accounts which means the liability from bank has been overstated in the case of holding company. These facts are not clear."

10. We have to test the correctness of the above finding and answer the substantial questions of law framed for consideration.

11. The entire case revolves around the interpretation of Section 68 of the Act, which reads as follows:

> "68. Where any sum is found credited in the books of an assessee maintained for any previous year, and the assessee offers no explanation about the nature and source thereof or the explanation offered by him is not, in the opinion of the Assessing Officer, satisfactory, the sum so credited may be charged to income-tax as the income of the assessee of that previous year."

12. In terms of the above provision where any sum is found

credited in the books of an assessee and the assessee offers no explanation about the nature and source thereof or the explanation offered by him is not in the opinion of the Assessing Officer satisfactory, the sum so credited may be charged to income-tax as the income of the assessee of that previous year. The Hon'ble Supreme Court in the case of P.Mohanakala explained the true scope of Section 68 of the Act, as follows:

> "16....."The question whether the source of the investment should be treated as income or not under Section 69 has to be considered in the light of the facts of each case. The contention of Shri Iyer was that the ratio of the decision would equally be applicable to interpret Section 68 of the Act. There is no dispute about the same but the assessees in no manner raised any plea that even if their explanation is not acceptable the same cannot be treated as an income in their hands. In cases where the explanation offered by the assessee about the nature and source of sums found credited in the books is not satisfactory there is, prima facie, evidence against the assessee viz., the receipt of money, the burden is on the assessee to rebut the same, and if he fails to rebut it can be held against the assessee that it was a receipt of an income nature. The alternative submission made by Shri Iyer before us would not help the assessees in this case in hand."

13. From the above decision, the two factors are clear that there should be actual receipt of cash/money and mere journal entries would not fall within the mischief of Section 68 of the Act. This aspect has been well explained in the case of P.Mohanakala (supra) by observing that it is only when the sums so credited may be charged to income tax as income of the assessee of the previous year. Therefore, we are required to take note of the keywords in Section 68 of the Act namely "any sum found to be credited" "nature and source thereof", if these two basic parameters are satisfied then Section 68 of the Act could be invoked. At that stage, the onus is on the assessee to offer an explanation with regard to such sum which was found to be credited in the books of account by offering an explanation about the nature and source thereof. If the assessee does not offer any explanation then the Assessing Officer would be well justified in applying Section 68 of the Act. However, if the assessee offers an explanation then the Assessing Officer has to come to a conclusion that the explanation offered by the assessee is satisfactory or not.

14. We have to, thus, see in the instant case, whether at the first instance, the Assessing Officer recorded any such satisfaction to invoke Section 68 of the Act. On a careful reading of the assessment order, we find that the Assessing Officer has misdirected himself in assuming that the assessee had letter of credit, when the fact remains that the assessee, in his letter, has specifically stated that it is the holding company, which had issued the letter of credit. Therefore, the Assessing Officer proceeded on a wrong direction by seeking information from the bankers of the assesee and observed that the assessee does not have any letter of credit facility. To be noted, it was never the assessee's case that they had availed any letter of credit facility. Consequently, the Assessing Officer proceeded to observe that there was no reason to disbelieve that the audited annual accounts of the two companies were audited by two qualified Chartered Accountants. Therefore, the Assessing Officer held that the explanation offered is not satisfactory.

15. In our considered view, recording of satisfaction by the Assessing Officer to invoke Section 68 of the Act is primordial and the satisfaction to be recorded should be with the reasons to state as to why the assessee's explanation is not found to be satisfactory. In the absence of any such finding, invoking provision of Section 68 of the Act has to be held to be perverse. One more important aspect is that though the Assessing Officer admits that the assessee, through authorized representative, were heard on several occasions, documents and records were produced, while completing the assessment makes an observation that the total liability towards purchase made by both the holding company and subsidiary company was not reconciled. This is clearly an erroneous finding as the documents and reconciliation statement were placed before the Assessing Officer and have also been filed before us as a paper book. Therefore, we have no hesitation to hold that the finding of the Assessing Officer was factually incorrect. Before the CIT (A), the assessee had specifically reiterated the stand regarding the book entries which were made by the assessee and the holding company. The CIT(A) did not make an endeavour to examine as to whether the reconciliation offered by the assessee was a satisfactory explanation or not. On the contrary, the CIT (A) had faulted the auditors of the assessee and came to a conclusion that the finding of the Assessing Officer is well justified. When the assessee came before the Tribunal, they once again placed all materials and stated that it was a case of wrong entry which have been duly rectified as on 30.04.2004 and the assessement for the holding company was completed on 29.03.2006 under Section 143(3) of the Act and therefore, there

is no case of unexplained credit or any sum or money flowing there from. As observed by us earlier, the Tribunal noted the decision in the cases of Sree Lekha Banerjee and P.Mohakala. However, the Tribunal did not give a categorical finding that the explanation offered by the assessee was not satisfactory.

16. The Tribunal states that the facts are not clear. In such circumstances, one of the modes available to the Tribunal was to call for information from the assessee or to remand the matter for fresh consideration either to the Assessing Officer or to the CIT(A). However, no such attempt was made by the Tribunal and the Tribunal has dismissed the appeal on probabilities, which is not the proper approach.

17. One more issue, which falls for consideration is whether mere book entries or journal entries by itself can be taken to have resulted in income for the assessee. This issue was explained by the Hon'ble Supreme Court in the case of CIT, Bombay City I Vs. Messrs. Shoorji Vallabhdas And Company [reported in 46 ITR 144] stating that no doubt, the Income-tax Act takes into account two points of time at which the liability to tax is attracted, viz., the accrual of the income or its receipt; but the substance of the matter is the income. If income does not result at all, there cannot be a tax, even though in book-keeping, an entry is made about a "hypothetical income", which does not materialise. Where income has, in fact, been received and is subsequently given up in such circumstances that it remains the income of the recipient, even though given up, the tax may be payable.

18. Mr.T.R.Senthil Kumar, learned Senior Standing Counsel referred to the decision in the case of Shri Narendra Kumar Sakaria Vs. Assistant Commissioner of Income Tax [TCA.No.1600 of 2008 dated 14.12.2018]. In the said case, the assessee contended that the remittance made by the nephew of the assessee who was a non resident Indian was a proper explanation and the same should have been accepted as a satisfactory explanation. The assessee in the said case placed reliance on the decision in P.Mohanakala. The Court after taking into consideration the factual aspect and the legal principle held that the explanation offered by the assessee was not acceptable as the assessee failed to establish through material that the donor who extend monies to the assessee had the wherewithal to fund the assessee who himself was a big business man operating several companies. Therefore, we find that the decision will be of no assistance to the revenue.

19. In the light of the above discussion, we are of the view that the order passed by the Tribunal is absolutely perverse. Thus, for all the above reasons the assessee is entitled to succeed. In the result, the appeal is allowed and substantial questions of law are answered in favour of the assessee. No costs.

s/d-
Assistant Registrar(CS VI)

True Copy

Sub-Assistant Registrar

mp/ska
To

1.The Income Tax Appellate Tribunal
Bench " B" Chennai

2.The Assistant Commissioner of Income tax,
Company Circle I (1),
Coimbatore.

3.The Commissioner of Income Tax (Appeals)I
Coimbatore

+1 CC to Mr.J.Balachandar, Advocate sr 59819
+1 CC to Mr.T.R.Suresh Kumar , Advocate sr 60561.

SP(27/09/2019)