IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 05.08.2019

CORAM:

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

Tax Case Appeal Nos.440 and 850 of 2009

Shri. D.Pandian, Proprietor,
M/s.Sivasakthi Movie Makers ...Appellant in both appeals

Vs

The Deputy Commissioner of
Income Tax, Media Circle -I,
Chennai - 34. ...Respondent in both appeals

Tax Case Appeals filed under Section 260-A of the Income Tax Act, 1961, against the orders of Income Tax Appellate Tribunal 'A' Bench, Chennai (i) dated 11.04.2008 in IT(SS) A.No.148/Mds/2005 and (ii) dated 23.08.2007 in IT(SS) A.No.38/Mds/2005 respectively, for Block Period from 01.04.1988 to 13.10.1998.
TCA NO.850 OF 2009: against the Order of the Commissioner of Income Tax (Appeals-VI), Chennai -34, dated:30/12/2004 in ITA NO.177/2004-2005 preferred against the order of Deputy Commissioner of Income Tax City Circle V(INV)(2), Chennai-6 dated 31.01.2001 (PAN.GIR NO.2707-P)
TCA NO.440 OF 2009: against the Order of the Commissioner of Income Tax (Appeals-VI), Chennai -34, dated:04.01.2005 in ITA NO.178/2004-2005 against the Order of Deputy Commissioner of Income Tax, City Circle V(INV)(2), Chennai-6, dated 26.07.2001 (PAN GIR NO.2707-P)

For Appellant : Mr.M.P.Senthil Kumar
[in both appeals]

For Respondent : Mr.T.R.Senthil Kumar, SSC &
[in both appeals] Mrs. K.G.Usha Rani, SC

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COMMON JUDGMENT

[Judgment was delivered by T.S.SIVAGNANAM, J]

These appeals are filed by the assessee under Section 260-A of the Income Tax Act, 1961 (hereinafter referred to as 'the Act') challenging the orders (i) dated 11.04.2008 in IT(SS)

A.No.148/Mds/2005 and (ii) dated 23.08.2007 in IT(SS) A.No.38/Mds/2005, both passed by the Income Tax Appellate Tribunal 'A' Bench, Chennai (hereinafter referred to as 'Tribunal') for Block Period from 01.04.1988 to 13.10.1998.

2. The appeals were admitted on 20.10.2009 on the following substantial questions of law:

> "TCA.No.440 of 2009:
>
> Whether on the facts an in the circumstances of the case, the Income Tax Appellate Tribunal was right in law in sustaining the penalty under Section 158BFA(2) of Income Tax Act?"
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> TCA.No.850 of 2009:
>
> 1. Whether on the facts and in the circumstances of the case, the Income Tax Appellate Tribunal was right in law in not admitting the additional evidence filed before it without considering the affidavits filed by the authorized representative stating the circumstances in which the grounds were not pressed? 2. Whether on the facts and in the circumstances of the case, the Income Tax Appellate Tribunal was right in law in not considering the affidavits filed by the Authorized Representative who appeared before the CIT(A), stating that the reason for raising the grounds before the Tribunal with additional evidence, which were not pressed before the CIT (A)? and
>
> 3. Whether on the facts and in the circumstances of the case, the Income Tax Appellate Tribunal was right in law in upholding the additions of Rs.20,00,000/- being payment made to producers & Rs.28,50,000/- under the head "Own Finance?"

3. First, we take up for consideration TCA.No.850 of 2009.

4. The assessee is engaged in the production and distribution of films under the name and style "Sivasakthi Movie Makers". A search was conducted in the business and residential premises of the assessee on 13.10.1998, pursuant to which, a notice under Section 158BC of the Act was issued and the assessee filed his block return on 13.07.2000 declaring a total undisclosed income of Rs.31,74,474/-. The Assessing Officer completed the assessment under Section 158BC(c) of the Act on 31.01.2001 arriving at a total undisclosed income of Rs.2,12,83,164/- and made an addition of Rs.20 Lakhs being payment made by the assessee to the producers at the time of

executing the agreements and another addition of Rs.28,50,000/- under the head 'Own Finance'.

5. Aggrieved by such order, the assessee preferred an appeal before the Commissioner of Income Tax, Appeals -VI [hereinafter referred to as the CIT(A)] in ITA.No.177/04-05. By order 30.12.2004, the appeal filed by the assessee was partly allowed and as against the disallowed portion, the assessee filed an appeal before the Tribunal in IT(SS)A.No.38/Mds/2005. Vide order dated 23.8.2007, the Tribunal partly allowed the appeal filed by the assessee.

6. In the meantime, the Assessing Officer initiated penalty proceedings under Section 158BFA(2) of the Act and levied a penalty of Rs.1,08,65,214/- vide order dated 26.07.2001. Against such order, the assessee filed an appeal before the CIT(A) in ITA.No.178/2004-05. This appeal was partly allowed by order dated 11.01.2005 and the penalty to the extent of Rs.93,75,092/- was confirmed. As against the said order dated 11.1.2005, the assessee filed an appeal before the Tribunal in IT(SS)) A.No.148/Mds/2005 and it was partly allowed by order dated 11.04.2008. Thus, aggrieved by both the orders passed by the Tribunal, the assessee is before us by way of these appeals raising the aforementioned substantial questions of law.

7. We find from the order passed by the Tribunal dated 23.08.2007, which is impugned in TCA.No.850 of 2009, that the Tribunal remanded the matter to the Assessing Officer to give an opportunity to the assessee to explain the source of Rs.80 Lakhs, which was received from Siva Sakthi Theatre. However, with regard to the plea raised by the assessee pertaining to the additions of Rs.20,00,000/- and Rs.28,50,000/-, the Tribunal rejected the assessee's plea stating that the said ground raised by the assessee did not arise out of the impugned order passed by the CIT(A) dated 30.12.2004. The reason being that the CIT (A), in paragraph 5.2.1 of his order dated 30.12.2004, while recording that though the assessee had produced a list of producers, who had given advances for taking distribution rights, they failed to produce confirmation letter before the CIT(A) and that the said ground was not pressed by the authorized representative/Chartered accountant of the assessee, confirmed the additions and dismissed the appeal in respect of that ground.

8. Therefore, the Tribunal stated that the ground canvassed by the appellant/assessee before the Tribunal did not arise out of the impugned order passed by the CIT(A). Therefore, we find from the grounds raised by the appellant/assessee before the Tribunal, that the assessee specifically contended that though they produced the names and addresses of the theatre owners,

from whom, they received the advances, the confirmation letters could not be produced by the assessee due to paucity of time, that however, the appellant had not pressed the ground on the assumption that CIT(A) would consider this addition for future telescopic purposes and that having not done so by merely dismissing the appeal, the assessee was aggrieved.

9. This specific plea was raised by the assessee in ground Nos.2, 3 and 3.1 before the Tribunal. In addition to that, the assessee further contended that the Chartered accountant of the assessee filed an affidavit duly notarized dated 20.08.2007 stating that he did not press for the allowance amount of Rs.20,00,000/- being the addition made on account of payment to producers, as, at that time, the assessee was not able to get any confirmation letters with regard to the source for the payments, that the CIT(A) had agreed to consider the assessee's claim for the set off against other additions, that however, the CIT(A) merely stated that the grounds on this issue were dismissed as not pressed and had not considered the prayer for telescoping and that the assessee got confirmation letters from some of the parties and the Chartered accountant submitted the same before the Tribunal by filing his affidavit in support of the same.

10. It was further submitted in the said affidavit dated 20.8.2007 that the assessee was aggrieved by the order passed by the CITA(A) and prayed for an opportunity to substantiate his case with evidence. Further, it was prayed that as the confirmation letters filed along with the affidavit of Chartered accountant being fresh evidence, he requested the same to be admitted and taken on record for being considered in accordance with law.

11. The affidavit dated 20.8.2007 clearly stated that it had been filed by the Chartered Accountant to explain the reason for the stand taken by him before the CIT(A). The Tribunal, though referred to the affidavit filed by the Chartered Accountant in paragraph 4 of the order dated 23.08.2007, did not advert to its efficacy or to the stand taken by the Chartered Accountant of the assessee, but merely stated that the said ground did not arise out of the order passed by the CIT(A) dated 30.12.2004. Further, with regard to other additions of Rs.28,50,000/-, a similar stand had been taken by the assessee before the Tribunal.

12. In our considered view, when the veracity of the affidavit filed by the Chartered Accountant was not doubted by the Tribunal, an appropriate approach would have been to remit the said issue for a fresh consideration and afford an opportunity to the assessee to establish the correctness of the

confirmation letters issued by various parties. In such a situation, it is well open to the Assessing Officer to exercise power under the Act and even summon the parties, who had issued the confirmation letters, to examine the correctness of the stand taken by the assessee. In our view, had such appropriate approach been adopted, in all probabilities, the matter would have concluded by this time and there would have been no necessity for filing this appeal. Thus, we are of the view that the matter should be remanded to the Assessing Officer for a fresh consideration.

13. With regard to TCA.No.440 of 2009, the stand taken by the Revenue was that penalty under Section 158BFA(2) of the Act is automatic. This is being contested by the assessee by arguing that the Tribunal ought to have considered the matter as a separate proceedings and merely because in the quantum, the assessee was unsuccessful, the Tribunal should not have rejected the appeal against the levy of penalty under Section 158BFA(2) of the Act. The Revenue, on the other hand, seeks to sustain the order passed by the Tribunal by contending that the penalty is automatic.

14. The quantum appeal, which is the subject matter of TCA.No.850 of 2009 was considered by us and we have held that the matter has to be remanded to the Assessing Officer to consider the confirmation letters, which have been filed by the assessee before the Tribunal along with affidavit filed by the Chartered Accountant. Therefore, in our view, what the assessee would have contended before the Tribunal was that the CIT(A) failed to consider the request of the assessee for telescoping.

15. Learned counsel for the appellant/assessee has contended that there are several decisions to show that penalty is not automatic and in support of such contention, he has relied upon the decision of a Division Bench of the Rajasthan High Court in the case of CIT Vs. Satyendra Kumar Dosi [reported in (2009) 315 ITR 0172] and a Division Bench of the Delhi High Court in the case of CIT Vs. Harkaran Das Ved Pal [reported in (2011) 336 ITR 8].

16. In our view, since we are remanding the issue regarding the two additions made by the Assessing Officer for a fresh decision, we refrain from expressing any opinion with regard to levy of penalty as to whether it is automatic or not. Since the matter is remanded, then obviously the issue regarding levy of penalty can very well be reconsidered by the Assessing Officer.

17. For the above reasons, TCA.No.850 of 2009 is allowed, the finding rendered by the Tribunal recorded in paragraph 6 of the order dated 30.12.2004 is set aside and matter is remanded

to the Assessing Officer for a fresh consideration. The Assessing Officer is directed to consider the confirmation letters furnished by the assessee along with an affidavit filed by the Chartered accountant dated 20.8.2007 and proceed in accordance with law. No costs.

18. With regard to TCA.No.440 of 2009, the levy of penalty is set aside and the issue is remanded back to the Assessing Officer to take a fresh decision after taking a decision in the quantum appeal and after affording an opportunity of personal hearing to the assessee. No costs.

Sd/-

Assistant Registrar

//True Copy//

Sub Assistant Registrar

To

1. The Commissioner of Income Tax Appeals(VI)
   Chennai

2. The Deputy Commissioner of Income Tax,
   Media Circle-I,
   Chennai-34.

3. The Deputy Commissioner of Income Tax,
   City Circle I(INV)(2),
   Chennai-6.

+1cc to Mr.T.R.Senthilkumar, Advocate, S.R.No.67212
+1cc to M/s.Philip George, Advocate, S.R.No.67678

TCA.Nos.440 & 850 of 2009

BP(CO)
RV(19/11/2020)