IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 09.08.2019

CORAM:

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

Tax Case Appeal No.757 of 2009

M/s. Rainbow Foundations Ltd,
No.4, Thanikachalam Street,
T.Nagar, Chennai - 17. ... Appellant

Vs

The Deputy Commissioner of Income Tax,
Company Circle V(2),
Chennai ... Respondent

Tax Case Appeal filed under Section 260-A of the Income Tax Act, 1961, against the order of Income Tax Appellate Tribunal Chennai 'B' Bench, dated 27.06.2008 in ITA No.2142/Mds/2007 for the Assessment Year 2002-03, as against the order dt.04/06/07 of the Commissioner of Income Tax(Appeals)-III, Chennai in ITA.NO.225/05-06, for the assessment year 2002-03, and as against the order dated 31/03/05, of the Deputy Commissioner of Income Tax, Chennai in P.A.NO.AAACR3089B, for the Assessment year 2002-03.

For Appellant : Ms. E. Malini
for M/s.Pass Associates

For Respondent : Mr.T.Ravikumar,SSC

JUDGMENT

[Judgment was made 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 27.06.2008 passed by the Income Tax Appellate Tribunal Chennai 'B' Bench (hereinafter referred to as 'Tribunal') in ITA No.2142/Mds/2007 for the Assessment Year 2002-03.

2. This Tax Case Appeal was admitted on 03.11.2009 on the following substantial questions of law:

> "1.Whether on the facts and in the circumstances of the case, the Tribunal is justified in law in treating the property let out at Pondy Bazaar, T.Nagar, as income arising under the head "business" and not as "income from house property? and
>
> 2. Whether on the facts and in the circumstances of the case, the Tribunal was justified in law in construing the property as a stock-in-trade and consequently the income thereon is assessable under the head "income from business?"

3. We have heard Ms.E.Malini, learned counsel for M/s. Pass Associates, learned counsel for the appellant/assessee and Mr.T.Ravikumar, learned Senior Standing Counsel for the respondent/Revenue.

4. The short issue, which falls for consideration in the instant case is as to whether the rent received by the assessee in respect of certain unsold flats should be treated as a receipt under the head "house property" or "business income".

5. The Assessing Officer vide order dated 31.03.2005, passed under Section 143(3) of the Act, treated the said property as stock-in-trade of the assessee's business and accordingly, held that deductions/allowances relating to profits and gains are not allowed. This finding was confirmed by the Commissioner of Income Tax (Appeals) - XII, Chennai [hereinafter referred to as 'CIT(A)'] vide order dated 04.06.2007, which has been affirmed by the Tribunal vide impugned order dated 27.06.2008.

6. To decide the question of law framed for consideration, we have required to examine the relevant facts.

7. Ms.E.Malini, learned counsel appearing for the assessee pointed out that the CIT(A) had passed the order dated 04.06.2007 without giving an opportunity to the assessee, as on the previous hearing date i.e., on 21.09.2006, the authorized representative of the assessee could not present as he was at Bangalore and an application praying for a short adjournment was filed on 21.09.2006. However, without assigning any fresh date, the order has been passed by the CIT(A) on 04.06.2007.

8. It is the further submission of the learned counsel appearing for the assessee that the conclusion of the Assessing Officer, that the rent received by the assessee from the immovable property owned by it has to be assessed under the head "income from business" merely because the property, which has earned rent, is part of stock-in-trade, is an incorrect finding. Further, it is submitted that the CIT(A) had erred in arriving at a conclusion that the assessee does not own the property from which the rent is earned. It is further submitted that the authorities failed to appreciate that the job of the assessee was never to be the business of letting out the properties.

9. In support of her contentions, learned counsel placed reliance on the decisions of Hon'ble Supreme Court in the cases of Chennai Properties & Investments Ltd. Vs. CIT [reported in (2015) 373 ITR 0673] and Raj Dadarkar and Associates Vs. ACIT-CC-46 [reported in (2017) 394 ITR 592].

10. Mr.T.Ravikumar, learned Senior Standing Counsel appearing for the respondent/Revenue, while seeking to sustain the order passed by the Tribunal, elaborately referred to the profit and loss account for the year ended on 31.03.2002 and submitted that in the column 7 therein, which lists out Current Assets, Loans, Advances and Deposits, T.Nagar property has not been shown, whereas in column 8, which pertains to Current liabilities & Provisions, the advance for commercial complex at T.Nagar has been mentioned. Further, it is submitted that in column 10, pertaining to Project income, T.Nagar property does not feature. Similarly, in column 12 relating to Project expenditure, T.Nagar does not find place. Therefore, it is submitted that the Assessing Officer after considering the entire facts had come to the conclusion that the property is only a stock-in-trade of the assessee's business and deduction relating to profits and gains are not allowable. Therefore, it is submitted that the order passed by the Tribunal may be sustained.

11. Ms.E.Malini, leaned counsel appearing for the appellant/assessee prefaced her submission by submitting that no adequate opportunity was granted to the assessee by the CIT(A). In fact, there is nothing on record for the Revenue to show that the CIT(A) had afforded a reasonable opportunity to the assessee before taking a decision vide order dated 04.06.2007.

12. On a reading of the order passed by the Tribunal, we find that no reasonable opportunity has been given to the assessee by the Tribunal. The assessee has to be partially blamed for the present situation because the assessee did not place the relevant documents before the Assessing Officer except the profits and loss account. Further more, the assessee did not place emphasis on their stand that they were not in the business of letting out the properties.

13. Further, for the first time before the CIT(A), the assessee contended that the properties are built by the assessee on the land taken on joint venture, and the land owner has collected the full value of the land as per the terms of the agreement and the assessee has taken possession of the land and in terms of Section 27 of the Act read with Section 53A of Transfer of Property Act, the transfer of land has taken place in favour of the assessee and the construction is done by the assessee itself.

14. Though such a plea raised by the assessee before the CIT (A), the assessee could not put forth the submissions effectively before the CIT(A), as they did not have adequate opportunity to place the material. Furthermore, the CIT(A) discusses the case law on the subject, but there is no in depth discussion on the nature of transaction done by the assessee and that they are "Owner" of the property, who had a right to let out the same. When the matter was taken before the Tribunal, we find that no independent exercise was done by the Tribunal to examine the case of the assessee. Surprisingly, the order passed by the Tribunal is verbatim extract of the findings recorded by the CIT(A). This is clear by comparing paragraph 5 of the Tribunal's order with paragraph 7 of the order passed by the CIT (A).

15. In our considered view, this is not the manner in which the Tribunal, being the last fact finding authority, could dispose of an appeal. Be that as it may, we are of the considered view that the assessee should be afforded an opportunity to place all relevant materials before the CIT(A), who shall examine the documents and then take a fresh decision in the matter.

16. For the above reasons, the appeal filed by the assessee is allowed, the order passed by the Tribunal and the order passed by the CIT(A) dated 04.06.2007 are set aside and the matter is remanded to the CIT(A) for fresh consideration. The

substantial questions of law are left open. It will be open to the assessee to place all documents to establish their case as well as the decisions, which they propose to rely on. After affording an reasonable opportunity to the assessee, the CIT(A) shall take a fresh decision in the matter uninfluenced by any observations made in the order dated 04.06.2007, which we have set aside. No costs.

Sd/-
Assistant Registrar(CS III)

//True Copy//

Sub Assistant Registrar

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To

1.The Deputy Commissioner of Income Tax,
Company Circle V(2),
Chennai

2.The Income Tax Appellate Tribunal,
Chennai 'B' Bench, Chennai.

3.The Commissioner of Income Tax(Appals)-XII
Chennai-34.

+1cc to Mr.T.Ravikumar, Advocate sr.68752

Tax Case Appeal No.757 of 2009

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nr 09/10/2019