IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 16.08.2019

CORAM:

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

Tax Case Appeal Nos.1058 of 2010 & 420 of 2011

The Commissioner of Income Tax - LTU,
Chennai. ... Appellant in both appeals

Vs

M/s. Chemplast Sanmar Ltd.,
9, Cathedral Road,
Chennai - 86. ... Respondent in both appeals

Prayer
T.C.A.No.1058 of 2011:

Tax Case Appeal filed under Section 260-A of the Income Tax Act, 1961, against the order of Income Tax Appellate Tribunal Chennai 'A' Bench, dated 07.05.2010 in ITA No.611/Mds/2009 for the Assessment Year 2004-05,

and against the order of the Commissioner of Income Tax, Large Tax Payer Unit, Chennai, dated 09/03/2009 made in PAN No.AAACC3000F, and against the order of the Assistant Commissioner of Income Tax Company Circle I (3), Chennai, dated 20.12.2006 made in GI No/PAN No.AAACC3000F Assessment Year 2004-05.

T.C.A.No.420 of 2011:

Tax Case Appeal filed under Section 260-A of the Income Tax Act, 1961, against the order of Income Tax Appellate Tribunal Chennai 'C' Bench, dated 29.04.2011 in ITA No.89/Mds/2011 for the Assessment Year 2004-05,

and against the Order of the commissioner of Income Tax, (Appeals) Large Tax Payer Unit, Chennai, dated 07/10/2010 made in ITA 32/09-10/LTU(A) and against the order of the Assistant Commissioner of Income Tax, Large Tax Payer Unit, Chennai dated 25/11/2009 made in GI No/PA No.AAACC3000F, Assessment Year 2004-05.

For Appellant : Mr.T.Ravikumar, SSC
[in both appeals]

For Respondent : Mr. Vikram Vijayaraghavan
[in both appeals] Mr.Venkata Narayanan

COMMON JUDGMENT

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

These appeals by the Revenue filed under Section 260-A of the Income Tax Act, 1961 (hereinafter referred to as 'the Act') are directed against the order dated 07.05.2010 passed by Income Tax Appellate Tribunal Chennai 'A' Bench (hereinafter referred to as 'Tribunal') in ITA No.611/Mds/2009 for the Assessment Year 2004-05 and the order dated 29.04.2011 passed by Income Tax Appellate Tribunal Chennai 'C' Bench (hereinafter referred to as 'Tribunal') in ITA No.89/Mds/2011 for the Assessment Year 2004-05.

2. There are two tax case appeals, which have been clubbed together pertaining to very same assessee for the Assessment year 2004-05. TCA.No.1058 of 2010 is taken as the lead case and a decision in this appeal would cover TCA.No.420 of 2011, since the Tribunal allowed the assessee's appeal following the impugned order in TCA.No.1048 of 2010. Therefore, we take up TCA.No.1058 of 2010.

3. TCA.No.1058 of 2010 was admitted on 07.12.2010 on the following substantial question of law:

> "Whether on the facts and circumstances of the case, the Tribunal was right in setting aside the order of the Commissioner of Income Tax under Section 263 directing the Assessing Officer to add the provision of gratuity of Rs.61,71,603/- allowed by him without applying his mind to the allowability of provision for gratuity under the computation of income under the normal provisions of the Act, on the wrong assumption that the assessee had made no such claim, holding that the power under Section 263 could not be invoked in the case of a debatable issue?"

4. TCA.No.420 of 2011 was admitted on 11.10.2011 on the following substantial question of law:

> "Whether on the facts and in the circumstances, the Income Tax Appellate Tribunal was right in quashing the order passed by the Assessing Officer under Section 143 read with Section 263?

5. The Assessment for the year under consideration i.e., 2004-05 was completed under Section 143(3) of the Act dated 20.12.2006 and the Assessing Officer computed the total income under the normal provisions of the Act at Rs. 8,05,01,900/- and the book profits under Section 115JB of the Act at Rs.20,849,495/-. While computing the book profits under Section 115JB of the Act, the Assessing Officer found that the assessee had made a provision for gratuity to the tune of Rs.61,71,603/-. The Assessing Officer added back the said amount since any provision made for an unascertained liability has to be added back and while doing so, an observation was made that while the provision for gratuity has been added back to the income for normal computation, the same has not been added back to the book profits under Section 115JB of the Act.

6. The Commissioner of Income Tax Large Taxpayer Unit [hereinafter referred to as ("CIT")] initiated proceedings under Section 263 of the Act as he was of the view that the assessment completed by the Assessing Officer was erroneous and prejudicial to the interest of Revenue. There are three grounds, which were pointed out by the CIT in the notice issued under Section 263 of the Act dated 03.02.2009, of which, we are concerned with only one of the issue namely whether the provision for gratuity was allowable as deduction under Section 40A(7)(b) of the Act. The assessee was given an opportunity to put forth his submissions, which were promptly done by the assessee and the CIT, by order dated 09.03.2009, held that the assessment order dated 20.12.2006 was erroneous and accordingly, directed the amount to be added back while computing the book profits under Section 115JB of the Act. The assessee filed an appeal before the Tribunal, which was allowed by the impugned order primarily holding that the CIT could not have exercised powers under Section 263 of the Act.

7. Mr.T.Ravikumar, learned Senior Standing Counsel for the appellant/Revenue submitted that the Tribunal erred in not appreciating the fact that the Assessing Officer did not apply his mind while taking a decision not to add back the provision for gratuity. Further, the Assessing Officer misdirected himself in assailing that the assessee had not claimed the deduction in respect of provision for gratuity under normal computation. Further, it is contended that the Tribunal erred in setting aside the CIT order passed under Section 263 of the Act on the ground that the issue was debatable and without considering the

fact that the order passed by the Assessing Officer was clearly erroneous and prejudicial to the interest of Revenue, as there was no assessment.

8. To support his contentions, learned Senior Standing Counsel for the appellant/Revenue placed reliance on the following decisions:

(i) CIT Vs. South India Shipping Corporation Ltd. [reported in (1998) 233 ITR 0546 (Madras)];

(ii) CIT Vs. Seshasayee paper & Boards Ltd. [reported in (2000) 242 ITR 0490 (Madras)];

(iii) Ashok Leyland Ltd. Vs. CIT [reported in (2003) 260 ITR 0599 (Madras)]; and

(iv) TTK LIG Ltd., Vs. ACIT [reported in (2012) 346 ITR 0452 (Madras)].

9. Mr.Vijayaraghavan, learned counsel appearing for the respondent/assessee sought to sustain the order passed by the Tribunal and submitted that the Tribunal has clearly held that the power under Section 263 of the Act could not have been invoked by the CIT, as the issue was clearly debatable at the relevant point of time and this has been brought out by the Tribunal in a proper manner and the order passed by the Tribunal does not call for any interference.

10. We have elaborately heard the learned counsel for the parties and given our anxious consideration to the materials placed before us.

11. The power under Section 263 of the Act can be invoked by the CIT. The power under Section 263 of the Act is a power given for revision of orders prejudicial to revenue. The CIT, in exercise of such power, may call for and examine the records of any proceedings under the Act and if he considers that any order passed therein by the Assessing Officer is erroneous insofar as it is prejudicial to the interests of Revenue, he may after giving the assessee an opportunity of being heard and after making or causing to be made such inquiry as he deems necessary, pass such order thereon as the circumstances of the case justify, including an order enhancing or modifying the assessment, or cancelling the assessment and directing a fresh assessment.

12. Section 263 of the Act contemplates under what circumstances the Commissioner can invoke such power. The law laid down in the decisions are to the effect that for the Commissioner to be satisfied that the power under Section 263 of the Act has to be invoked. He has to be satisfied that the order

passed by the Assessing Officer was erroneous in so far as it is prejudicial to the interests of the Revenue. The Courts while interpreting the provision held that every erroneous order will not be prejudicial to the interests of the Revenue. Likewise, every order passed by the Assessing Officer, which is prejudicial to the interests of Revenue may not be erroneous. Thus the settled legal position is that the law laid down in Section 263 of the Act is to be simultaneously and conjointly satisfied.

13. In the instant case, the CIT held that the assessee is not entitled for deduction under Section 40A(7)(b) of the Act in the light of Section 43B of the Act, which states that no deduction is permissible without a provision is made but deduction is permissible only when actual payment is effective. We are not called upon to decide the effect of Section 40A(7)(b) of the Act visa-vis Section 43B of the Act as to whether both the provisions are conflict with each other as we are required only to decide as to whether this was a fit case that the CIT could have been invoked the power under Section 263 of the Act. To decide this issue, we may straightaway refer to the finding recorded by the Tribunal in paragraph of 1 of its order. In the said paragraph, the Tribunal has noted the submission of the assessee and the documents filed by the assessee in the form of paper book. In the said paper book in page No.9, there is an audit report wherein, the auditor has recorded as follows:

> "2.........He further drew our attention to page 6 of the paper book, which was a copy of the audit report under Section 44AB, wherein in item No.17(i), the auditor had specifically mentioned that there was no amount which was not eligible under Section 40A(7). He further drew our attention to page 8, which was the part of the audit report showing the details in respect of the sum referred to clause (b) of Section 43B, wherein in the note in item No.3, it has been specifically mentioned that based on the decision in the case of CIT Vs. Commonwealth Trust (I) Limited (269 ITR 290) the provision for contribution to gratuity fund is considered by the assessee as an allowable expenditure."

14. From the above clarification made by the Auditor in the audit report, it is seen that the assessee has specifically mentioned about the decision in the case of Commonwealth Trust and stated that the provision for contribution to gratuity fund is considered by the assessee as an allowable expenditure.

15. The argument put forth by Mr.T.Ravikumar, learned Senior Standing Counsel for the appellant/Revenue is that the Tribunal in paragraph 5 of the impugned order, has held that the provision is not an approved fund of the LIC.

16. In our considered view, if such interpretation is accepted, it would amount to misreading the order of the Tribunal. What the Tribunal has recorded is that the payment has not been effected to the approved gratuity fund, but only provision has been made by the asssessee. This would be the correct manner of reading the order passed by the Tribunal, more particularly, the observations made by the Tribunal in paragraph 5 of the order.

17. It is submitted by the learned counsel for the respondent/assessee that the decision in Commonwealth Trust Private Ltd continues to hold the field and if the said decision had been relied on by the assessee while filing the returns and making a claim for deduction on the provision made, if the CIT is of the view that the said decision would not apply for reasons stated by it, this is undoubtedly a debatable issue. The CIT placed reliance on the decision of the High Court of Calcutta in the case of CIT Vs. Sree Kamakhya Tea Co. (P) Ltd. [reported in (199 ITR 714)]. In fact the said decision, was also considered in Commonwealth Trust Private Ltd.

18. The learned Senior Standing Counsel for the appellant/Revenue placed reliance on the decision of High Court of Kerala in the case of CIT Vs. Popular Vehicles & Services Ltd. [reported in (2010) 33 DTR 140]. The said decision does not related to interpretation of Section 40A(7)(b) of the Act, but pertains to as to whether what would be the relevant date for effecting payment to approve gratuity whether it would be the last date of filing return or the date prescribed under relevant statute. Therefore, the decision in the case of Popular Vehicles cannot be applied to the facts of the case.

19. In the case of South India Shipping Corporation Ltd., the Court upheld the order of the CIT under Section 263 of the Act on the ground that there was no proper inquiry done by the Assessing Officer, which is not the case of the Revenue in the present appeal before us and therefore, the said decision cannot be applied to the facts of the present case.

20. In the case of Seshasayee Paper & Boards Ltd., the Court confirmed the order passed by the CIT invoking the power under Section 263 of the Act, as it was found that the records did not show that the ITO had considered the points on which the revision was made. In the appeals on hand, there is no such

allegation made by the Revenue and therefore, the decision cannot be applied to the facts of the present case. Equally, the decision in the case of Ashok Leyland Ltd., and TTK LIG Ltd., also cannot be applied to the facts of the present case, as in both decisions, the Court, on facts, found lack of proper inquiry by the Assessing Officer.

21. As pointed out by us earlier, the assessee while stating that the provision for contribution to gratuity fund was considered by them as an allowable expenditure, specifically placed reliance on the decision in the case of Commonwealth Trust. Apart from that, before the Tribunal the assessee placed the decision of the High Court of the Delhi in the case of CIT Vs. Bechtel India (P) Ltd. [reported in (2008) 2 DTR 145] and the decision of the Jaipur Tribunal. Thus, as rightly held by the Tribunal, there were conflicting views. The question as to whether the provision for contribution to gratuity fund is an allowable expenditure under Section 40A(7)(b) of the Act was a debatable issue at the relevant point of time and therefore, when two views are possible, that too, what the assessee relied on the decision of High Court of Kerala, though not a jurisdictional Court, the assessment could not have been stated to be erroneous and prejudicial to the interests of revenue. Therefore, the Tribunal rightly allowed the assessee's appeal and set aside the order passed by the CIT dated 09.03.2009.

22. In the result, the appeals are dismissed and the substantial questions of law are answered against the Revenue. No costs.

Sd/-
Assistant Registrar(CCC)

//True Copy//

Sub Assistant Registrar

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To

1.The Commissioner of Income Tax (Appeals), LTU, Chennai.

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

3.The Income Tax Appellate Tribunal,
'C' Bench, Chennai.

4.The Assistant Commissioner of Income Tax
(L.T.U), Chennai.

5.The Assistant Commissioner of Income Tax,
Company Circle I (3), Chennai.

+1cc to Mr.T.Ravi kumar, Advocate Sr.69598
+1cc to M/s.Subbaraya Aiyar, Advocate Sr.69841

TCA. Nos.1058 of 2010
& 420 of 2011

br[co]
srg 15/10/2019