IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 10.06.2019

CORAM

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

Tax Case Appeal No.308 of 2019

Shri. V. Dwarakanathan,
No.256, Green Lands,
Nagaramalai Road, Salem-636 016.
PAN : ACAPD5443J ..Appellant

-Vs-

The Assistant Commissioner of Income Tax,
Central Circle 2(1),
Room No.122, First Floor,
Investigation Wing, 46,
Nungambakkam High Road, Chennai. ..Respondent

Appeal under Section 260A of the Income-tax Act, 1961 against the order dated 12.02.2019 made in I.T.A.No.3100/Chny/2017 on the file of the Income-tax Appellate Tribunal 'C' Bench, Chennai for the assessment year 2009-10 against the order of the Commissioner of Income tax (Appeals), chennai - 600 0034 dated 21.09.2017 and made in ITA No.367/16-17 and against the order of the Assistant Commissioner of Income Tax, Central circle - 2(1) dated 30.12.2016 and made in GI.No./PANo.ACAPD5443J.

For Appellant : Mr.G.Baskar

For Respondent : Mrs.K.G.Usharani
Standing Counsel

JUDGMENT
(Delivered by T.S.Sivagnanam, J.)

This appeal, by the appellant/assessee filed under Section 260A of the Income-tax Act, 1961 (hereinafter referred to as "the Act"), is directed against the order dated 12.02.2019, passed by the Income Tax Appellate Tribunal "C" Bench, Chennai (for brevity "the Tribunal"), in I.T.A.No.3100/Chny/2017, for the assessment year 2009-10.

2.The assessee has raised the following substantial questions of law for consideration:-

"Section 49:-

(i) Whether on the facts and in the circumstances of the case, the Income Tax Appellate Tribunal is right in law in holding that in the case of gift, Section 49 of the Income Tax Act, 1961 will not apply to give benefit to the Appellant while computing the capital gains in respect of cost of acquisition of the previous owners?

Alternative:-

(ii) Whether on the facts and in the circumstances of the case, the Income Tax Appellate Tribunal is right in law in not considering that once the transaction of gift is not valid and the Appellant had not become owner of the Shares and the same is held to be bogus, the capital gains cannot be assessed in the hands of the Appellant?"

3.Heard Mr.G.Baskar, learned counsel for the appellant/assessee.

4.Before we consider as to whether any substantial question of law arises for consideration or not in this appeal, we need to take note of the factual position.

5.The assessee is an individual filed his return of income on 09.11.2009 under Section 139 of the Act admitting a total income of Rs.3,88,430/-. A search was conducted in the group of Dr.A.M.Arun and others, who were the sons-in-law of the assessee on 01.12.2015. During the course of search, it was found that the assessee sold shares for a consideration of Rs.1.5 Crores during the financial year 2008-09. These shares were acquired by the assessee through gift from the wife of Dr.A.M.Arun, daughter of the assessee. It was found that no resultant capital gain was offered in return of income for the assessment year 2009-10. Thus, the assessment was reopened by the Income Tax Officer, Ward II(1), Salem. In the reasons for reopening, it was stated that during the course of search, the assessee has deposed in his sworn statement recorded under Section 132(4) of the Act that he sold his shares for Rs.1,50,00,000/- in the year 2008-09. These shares were stated to have acquired by the assessee through gift from his daughter Mrs.Meera Arun for Nil consideration and the profit was not disclosed to the Department.

6.Further, it was stated that the assessee offered additional income of Rs.1,50,00,000/- for the assessment year 2009-10 and agreed to pay the due tax. It was pointed out that during the course of search, gold jewellery being worth Rs.28,99,522/- was found and the assessee did not properly explain the source for the investment made. In the light of the deposition made by the assessee before the investing team while recording statement under Section 132(4) of the At, the Assessing Officer stated that he has reason to believe that the assessee's taxable income for the assessment year 2009-10 has escaped assessment. Therefore, notice under Section 148 of the Act was issued. The assessee did not respond to the notice. Subsequently, the jurisdiction of the case was transferred to the Principal Commissioner of Income Tax, Salem, vide notification dated 21.06.2016. Pursuant to which, notice under Section 142(1) of the Act was issued on 20.09.2016 calling for certain details along with return of income. Subsequently, a letter dated 20.09.2016 was sent to the assessee requesting him to file the return of income as well as the details called for in the notice dated 20.09.2016 issued under Section 142(1) of the Act. Once again, the assessee did not respond. A final opportunity was given by the Department to the assessee, vide letter dated 19.10.2016 calling upon him to file his return of income. Even for this notification, there was no response by the assessee. Subsequently, by letter dated 04.11.2016, penalty notices under Section 271(1)(b) of the Act were issued to the assessee calling upon him to explain why prosecution under Section 276CC of the Act should not be initiated for non filing of return of income in response to notice under Section 148 of the Act; and for levy of penalty for non compliance of notice under Section 142(1) of the Act should not be launched or levied or should not levied against the assessee. The assessee did not respond to any of these notices.

7.Thus, the Assessing Officer having left with no other option, completed the assessment proceedings ex-parte under Section 144 of the Act. After taking note of the materials available on record, the Assessing Officer rejected the contention of the assessee as not acceptable and that the sale of shares was not disclosed in original return of income and it came to light only during the course of search of the residential premises of the assessee and that the assessee admitted during the course of search to offer this amount as his taxable income. Accordingly, addition was made and the assessment was completed, vide order dated 30.12.2016.

8.Aggrieved by such order, the assessee preferred appeal before the Commissioner of Income-Tax (Appeals) 18, Chennai (for brevity, “the CIT(A)”) in I.T.A.No.367/16-17. The CIT(A) by order dated 21.09.2017 allowed the appeal. The reason assigned by the CIT(A) was that Section 49 of the Act clearly specifies that the cost of the acquisition of the asset will have to be reckoned on the basis of cost of acquisition to the previous owner, the action of the Assessing Officer in assuming the cost to be Rs.Nil is not correct. Accordingly the appeal stood allowed.

9.With regard to the assessment under the other heads also, which was put to challenge, the CIT(A) allowed the appeal. The Revenue filed appeal before the Tribunal. The Tribunal after considering the entire facts and circumstances of the case, allowed the appeal filed by the Revenue and this is how the assessee is before us by way of this appeal.

10.Mr.G.Baskar, learned counsel for the appellant/assessee submitted that the Tribunal erroneously reversed the well considered order passed by the CIT(A) and the observations of the Tribunal that the transaction was bogus is not sustainable. Further, it is submitted that the Tribunal ought to have seen that gift of movable is by way of delivery and the gift of shares by the assessee's daughter, Mrs.Meera Arun, to the assessee is a valid gift, as it is not mandatory that gift of movable assets, such as, shares needs to be by way of document much less a registered document. Further, it is submitted that there is no requirement of the donor's consent for selling the shares to third parties, since the assessee had already become owner by the positive action of original shareholder, his daughter, Mrs.Meera Arun by executing Gift Deed in respect of the shares in favour of the assessee. Further, the learned counsel referred to the Business Transfer Agreement, dated 31.12.2007; Return of Allotment of Vasan Health Care Private Limited, dated 28.10.2008; Share Transfer Form whereunder shares were transferred from Mrs.Meera Arun to the assessee, dated 29.10.2008; Share Transfer Form where the assessee transferred shares to M/s.Advantage Strategic Consulting Private Limited, dated 30.10.2008; Annual Return of Income of Mrs.Meera Arun for the assessment year 2009-10, dated 21.10.2009; Register of Allotment of Shares by Vasan Health Care Private Limited, under Section 143(3) of the Act of M/s.Vasan Health Care Private Limited for the assessment year 2009-10, dated 29.12.2011; Certificate issued by Advantage Strategic Consulting Private Limited for purchasing shares from the assessee, dated 23.11.2016; and the assessment order of Mrs.Meera Arun for the assessment year 2009-10, dated 30.12.2016.

11.It is submitted that these documents will clear show that the gift made by the assessee's daughter is a valid gift and the share transfer forms clearly show the transfer of 1,50,000 shares to Advantage Strategic Consulting Private Limited, which was filed before the Registrar of Companies. It is further submitted that the Tribunal grossly erred in holding that

Section 49 of the Act will not apply to the case of the assessee by observing that the assessee had not become the owner of the capital assets. When the assessee had become the owner of the shares by way of gift executed by his daughter and therefore, Section 49(1)(ii) of the Act would apply. Alternatively, it is submitted that the Tribunal having held that the transaction of gift is not valid, ought to have held that there was no capital gains that could arise out of a bogus transaction in the hands of the assessee. Thus, it is contended that the finding of the Tribunal is absolutely perverse and the substantial questions of law framed for consideration required to be decided by this Court.

12.After elaborately hearing Mr.G.Baskar, learned counsel for the appellant/assessee, we do not agree with the submissions made and the grounds canvassed before us. We substantiate this conclusion with the following reasons.

13.The Assessing Officer, in our considered view, has taken note of the entire factual thicket and has rejected the stand of the assessee. To be noted, the assessee did not cooperate in the assessment proceedings. This is clear from the factual position, which we have narrated above that to the repeated opportunities granted by the Assessing Officer to the assessee, none of which were availed by the assessee.

14.The Assessing Officer noting that the assessee did not submit any registered document commensurating the gift of the shares in favour of the assessee, had rejected on the ground that mere production of Form 7B and copy of share premium register cannot be treated as valid documents for proof, as M/s.Vasan Health Care Private Limited is a limited company. The Assessing Officer also noted that the assessee was called upon to furnish the Board's resolution of the companies, viz., M/s.Vasan Health Care Private Limited and M/s.Advantage Strategic Consulting Private Limited both of which were not submitted. Further, the assessee did not submit their share purchase agreement entered into between the assessee and M/s.Advantage Strategic Consulting Private Limited in spite of notice being issued.

15.Further, the Assessing Officer noted that shares were allotted to Mrs.Meera Arun on 28.10.2008 and these shares are said to have been gifted to the assessee on 29.10.2008 and out of 3,00,000 equity shares, which are alleged to have been gifted, 1,50,000 equity shares were transferred by the assessee to M/s.Advantage Strategic Consulting Private Limited on 30.10.2008 for a nominal value of Rs.100/- per share. The Assessing Officer further noted that the Board of Directors had given approval only for allotment of shares to Mrs.Meera Arun and no such approval was granted for transfer by way of gift to her father, viz., the assessee, who is also one of the Directors, which should have been approved by the Board of Directors. Further, the Assessing Officer stated that all the shares at nominal rate and share premium was allotted for cash and to this cash generation, the assessee did not furnish supportive document for source in the hands of his daughter Mrs.Meera Arun. Further, from the records, the Assessing Officer noted that Mrs.Meera Arun does not have sufficient source for cash during the assessment year 2009-10 to invest such huge cash in equity shares.

16.Further, the Assessing Officer observed that from the share application return of allotment in Form 2, M/s.Vasan Health Care Private Limited indulged in allotment of shares in cash for which without any basis inflated the share value by way of premium. Therefore, the Assessing officer rejected the same as unreliable in the absence of any business transaction with M/s.Advantage Strategic Consulting Private Limited that the assessee transferred the share to the said company on credit basis. Further, it was observed from the assessment records of M/s.Advantage Strategic Consulting Private Limited for the assessment year 2011-12 that, it had classified in computation of long term capital gains in respect of M/s.Vasan Health Care Private Limited, as number of shares sold, 30,000 equity shares of Rs.10/- each, which indicated that the purchase value of such shares by M/s.Advantage Strategic Consulting Private Limited was still at a premium value Rs.90/- per share.

17.With the above discussion, the Assessing Officer rejected the contention of the assessee as not acceptable.

18.The CIT(A), in our considered view, did not deal with all the issues and to say the least, the order is abridged. The discussion in the order is only in paragraph 6.1 which only deals as to the effect of Section 49 of the Act without referring to or dealing with the various contentions raised by the assessee or the Revenue. The matter was carried to the Tribunal by the Revenue and the following grounds raised by the Revenue before the Tribunal are very germane:-

> "2.2. The ld. CIT(A) had erred in not taking note of the analysis of the transfer of shares in quick succession on 28.10.2008, 29.10.2008 and 30.10.2008 which proves the above gift as bogus. The donor Smt. Meera Arun got allotted 3,00,000 shares of M/s.Vasan Health Care Pvt. Ltd., on 28.10.2008 and on the very next day, she transferred the entire shares to her father i.e., on 29.10.2008. In turn, Shri. Dwarakanathan, father of Smt. Meera Arun transferred 1,50,000

shares to M/s.Advantage Strategic Consulting Services P Ltd., on 30.10.2008. Smt. Meera Arun pays a sum of Rs.200/- per share comprising of Rs.100/- nominal value and premium of Rs.100/-, while Shri. Dwarakanathan had sold part of the shares to M/s.Advantage Strategic Consulting Pvt. Ltd., only at face value i.e., at Rs.100/- without charging any premium.

2.3 The ld. CIT(A) ought to have considered the fact that has come to light that the entire sale made by Shri Dwarakanathan was on credit basis and the actual consideration was received in the month of December, 2009 and October, 2010. In fact, M/s.Advantage Strategic Consulting Private Limited in turn has sold part of the shares to M/s.Sequola Capital India Growth Investment-I, Mauritius at Rs.7,500/- per share with a premium of Rs.7400/- on 30.10.2008.

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2.6. The ld. CIT(A) failed to note that the Board of Directors had given approval only for allotment of shares to Mrs. Meera Arun. Therefore, any gift to father who is also a Director should have been approved by the Board of Directors. In the absence of the same, the concept of gift/transfer to have taken place is false and is nothing but an afterthought only.

2.7. The ld. CIT(A) is not justified in omitting to have noted the fact that the analysis of the entire transaction in toto definitely shows that huge funds were mobilized to M/s.Advantage Strategic Consulting Private Ltd and thereby facilitating its subsididary at Singapore to acquire huge assets in Singapore. The ld. C(T)A should have seen the entire transaction wholistically and should have come to the final conclusion. Instead, he has viewed the issue of gift in isolation, thereby came to a wrong conclusion.

2.8. The ld. CIT(A) ought to have considered the fact that, within one day from the allotment of shares, there cannot be a change in the value of shares, therefore, there is no justification for not charging premium by Shri. Dwarakanathan. Further, once the gift is proved to be bogus and an arrangement, the ld. CIT(A) should have taken the Net Asset Value (NAV) and accordingly computed the cost per share as on 30.10.2008. by not doing so, the ld. CIT(A) had totally erred in coming to a wrong conclusion."

19.The Tribunal heard the parties and hold that the assessee has not disclosed the receipt of gift in the original return of income filed and later on claimed loss of Rs.1,50,00,000/- on sale of shares in the return of income filed in response to the notice under Section 148 of the Act. The Tribunal noted that the assessee had not filed any registered document of gift either before the Assessing Officer, or before the CIT(A) which shows that the assessee had not owned the said shares which was alleged to be gifted to him by his daughter Mrs.Meera Arun. Therefore, the Tribunal, on facts, concluded that the provisions of Section 49 of the Act did not apply to the facts of the case, since the said provisions envisages only where the capital asset becomes the property of the assessee, then the cost of acquisition of the asset will have to be reckoned on the basis of cost of acquisition to the previous owner and otherwise, no.

20.Thus, the Tribunal faulted the assessee in not furnishing any evidence either before the Assessing Officer, or before the CIT(A), or before the Tribunal that he held the gift by way of registered document and that the donor, his daughter, Mrs.Meera Arun had sufficient source for cash during the assessment year 2009-10 to invest such huge cash in 3,00,000 equity shares and therefore, on facts, the Tribunal approved the finding of the Assessing officer that the transaction was entirely bogus.

21.In our considered view, the assessee has not been able to dislodge any of the factual findings which have been re-appreciated by the Assessing Officer. Furthermore, as observed by us earlier, the assessee did not cooperate in the assessment proceedings for the reasons best known.

22.Thus, in our considered view, there is no question of law, much less substantial question of law arising for consideration.

23.In the result, the appeal fails and the same is dismissed. No costs.

abr

Sd/-
Assistant Registrar(CS VI)

//True Copy//

Sub Assistant Registrar

To

1.The Income-tax Appellate Tribunal 'C' Bench,
Chennai.

2.The Commissioner of Income-Tax (Appeals)-18,
46, Mahatma Gandhi Road,
Nungambakkam, Chennai-600 034.

3.The Assistant Commissioner of Income Tax,
Central Circle 2(1), Room No.122,
First Floor,Investigation Wing,
46, Nungambakkam High Road, Chennai.

+1cc to Mr.G.Baskar, Advocate, SR.No.46594
+1cc to Mr.T.R.Senthil Kumar, Advocate, SR.No.46842

T.C.A.No.308 of 2019

Kak(03/09/2019)