

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED :: 02-04-2019

CORAM

THE HON'BLE DR.JUSTICE VINEET KOTHARI

AND

THE HON'BLE MR.JUSTICE C.V.KARTHIKEYAN

T.C.A.No.676 OF 2018

Shri H.Abuthahir

...

Appellant/Appellant

-vs-

The Deputy Commissioner of Income Tax,
Non Corporate Circle I,
Coimbatore.

...

Respondent/Respondent

Appeal under Section 260A of the Income Tax Act, 1961, against the order of the Income Tax Appellate Tribunal, Chennai 'C' Bench, dated 28.02.2018, passed in ITA No.583/CHNY/2017 and against the order of the Commissioner of Income Tax (Appeals)-2, Coimbatore, dated 30/12/16 in ITA.No.248/15-16 and against the order of the Deputy Commissioner of Income Tax, Non-Corporate Circle 1, Coimbatore dated 05/02/16 in PAN.NO. AITPA 0537F.

For Appellant : Mr.N.V.Balaji

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

JUDGMENT

(Delivered by Dr.Vineet Kothari, J.)

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The Assessee, namely, Shri H.Abuthahir, Coimbatore, has filed this Appeal under Section 260A of the Income Tax Act, in short, 'Act', raising the purported Substantial Questions of Law arising from the order of the learned Income Tax Appellate Tribunal, Chennai 'C' Bench, dated 28.02.2018, whereby, the learned Tribunal dismissed the Appeal of the Assessee and upheld the orders passed by the lower Appellate Authorities for

Assessment Year 2013-2014.

2. The purported Questions of Law, which are raised in this Appeal, are quoted below for ready reference :

(1) Whether the Appellate Tribunal was right in holding that the provision of Section 69A of the Income Tax Act, 1961, can be invoked, when the income is estimated at 3.5% of the profits ?

(2) Whether the Appellate Tribunal was right in holding that de hors the provision of Section 69A of the Income Tax Act, 1961, still the addition was very fair and in accordance with law ?

(3) Whether the Appellate Tribunal is right in confirming the addition of Rs.58,15,990/- as unaccounted income u/s 69A, when the details of the payments made to Manappuram Finance from different parties are available in Form 26AS ?

(4) Whether the Appellate Tribunal was right in law in rejecting the refund claim and making addition of income u/s 69A to the extent of the refund claimed ?

3. All the three authorities below have concurrently made and upheld the Best Judgment Assessment in the case of the Assessee, who was engaged in the business of purchase and sale of gold from finance companies and had disclosed only commission income of 1% for the total quantum of turnover of purchase and sale of gold of Rs.23,32,17,428/-. The finance company, namely, M/s.Manappuram Finance Ltd., which sold the gold in question, collected Tax at Source during the said period in accordance with the provisions of Section 206C (1D) of the Act, which existed in the Statute Book for the Assessment Year in question, but was omitted later by Finance Act, 2017, with effect from 01.04.2017.

4. The Assessing Authority called upon the Assessee to disclose the details of the persons on whose behalf such purchase and sale of gold was made by him, as the 'Tax Collected at Source' by the Seller-M/s.Manappuram Finance Ltd.- could be given credit or refunded in the hands of such purchasers. But, the Assessee failed to disclose the details before the Assessing Authority in the Return of Income filed by him. The Assessee had claimed a refund of such Tax Collected at Source by M/s.Manappuram Finance Ltd, to the extent of Rs.17,45,898/-.

5. The Assessing Authority held that on account of failure of the Assessee to furnish the details of the purchasers, the Authority would estimate the income of the Assessee at 3.5% of the turnover of gold purchased and sold by him and not 1% as disclosed by him. This resulted in addition of Rs.58,15,990/- under Section 69A of the Act in the hands of

the Assessee.

6. A perusal of the Assessment Order, dated 05.02.2016, for Assessment Year 2013-2014 in the present case reveals that the Assessing Authority had given a Show Cause Notice to the Assessee for estimating the income of the Assessee at 3.5% as against 1% and the Assessee also filed a Reply to the said Show Cause Notice, dated 02.02.2016, but could not adduce any evidence with regard to average profit of 1% only. He only submitted that the proposed income of 3.5%, to be estimated by the Assessing Authority, was beyond reasonable margin.

7. The learned CIT (Appeals) as well as the learned Income Tax Appellate Tribunal dismissed the Appeals of the Assessee by the impugned orders. The relevant portions of the said orders, upholding the Assessment Order, are quoted below for ready reference :

Order of CIT (Appeals), dated 30.12.2016 :

''4.0. I have considered the grounds, facts and circumstances of the case and written submissions/arguments made by the AR. During the hearings, the AR also submitted certificates issued by two Jeweller shops of Coimbatore certifying that the appellant is a good appraiser whom they know for past 7 years. However, even before me, the AR has not produced details of parties on whose behalf the appellant participated in the auction conducted by Manappuram Finance during the relevant year. It is quite clear from the submissions that the appellant is making contradictory claims. On one hand, he states that the payments towards purchases of gold from Manappuram Finance as appearing in Form 26AS were made by different parties and on the other hand he claims that TCS made on those purchases belong to him because it appears in his name in Form 26AS. This is unacceptable. Even assuming that he was only an agent, the TCS having been made on purchases of gold, it is the tax collected from the purchasers and they are actually entitled to credit of this TCS. The appellant did not identify the parties on whose behalf the jewellery was purchased in the auction held by Manappuram Finance. He therefore acted in a way to shield actual purchasers from disclosing their identities and PAN, thereby helped them to keep these transactions out of tax net. That could be the reason why those parties did not bother to get TCS, which is just 1% of purchases, in their names. This peculiar situation in which TCS was made in appellant's name cannot be a ground to get the TCS credit in his name and claim refund. The offer of TCS amount as his income has no

rationale particularly when he states that he gets a commission of 50 paise to one rupee per gram of gold purchases made by the parties on whose behalf he participated in the auction. It was offered as income only to claim credit of TCS against the tax chargeable on that income. Another absurdity in this claim is that income offered is equivalent to tax credit sought against that income which in any case does not belong to him for the reasons stated above. In fact, the appellant did not produce any evidence in support of actual quantum of commission earned from this business. Under these circumstances, I am convinced that the AO has rightly estimated income corresponding to refund already paid and income so estimated clubbed with income already offered works out to 3.5% of purchases as proposed by the AO during the assessment proceedings. Accordingly, the addition made is upheld and grounds are dismissed.''

Order of ITAT, dated 28.02.2018 :

'9. We have considered the rival contentions and perused the orders of the authorities below. Though the assessee states that he was participating in old gold auction done by M/s.Manappuram Finance Ltd. on behalf of various parties, he could not produce any confirmation from any such parties. Form No.26AS was in the name of the assessee and this admittedly reflected purchases of gold worth Rs.23,32,17,428/-. Assessee had also claimed refund for the tax of Rs.17,45,898/- collected at source. Assessee having failed to produce any evidence in support of its contention that he was acting on behalf of others, when participating in the bid, the only reasonable presumption that can be drawn is that assessee himself was doing business. In such a situation, assessee having failed to produce any books of accounts, in our opinion, ld. Assessing Officer was left with no choice but to make an estimate of income, based on value of purchases made by the assessee. Estimation of 3.5% was in our reasonable. No doubt Assessing Officer has cited Section 69A of the Act while making the addition. However this by itself does not make the addition by estimating the income at 3.5% of the purchase turnover bad in law. Even dehors the said Section, the addition was very much fair and in accordance with law. We do not find any reason to interfere with the order of the ld. Commissioner of Income Tax (Appeals).

10. In the result, the appeal of the assessee stands dismissed.''

8. Mr.N.V.Balaji, learned counsel for the Appellant-Assessee, vehemently submits before us that even assuming that the Assessee could not produce the details of purchase and sale of the gold in question, the Assessee only acted as an Agent on behalf of the purchasers and earned only commission, which he duly disclosed at the rate of 1% of the total turnover of gold sold by M/s.Manappuram Finance Ltd. through him and, therefore, merely to deny the refund claim of the Assessee of the Tax Deducted at Source by the said M/s.Manappuram Finance Ltd. under Section 206C (1D) of the Act on the sale of gold, the Assessing Authority made the impugned additions under Section 69A of the Act to raise the demand of tax against the Assessee. The learned counsel further submitted that no further evidence was brought on record by the Assessing Authority to justify the estimation of income at the rate of 3.5%, whereas the trade of this nature did not yield more than 1% of profit. He also relied upon a decision of the Income Tax Appellate Tribunal, Hyderabad Bench 'A', Hyderabad, in the case of Income Tax Officer v. M/s.Vonamala Jagadishwaraiah, in ITA No.1783/Hyd/2013, dated 08.04.2015, and submitted that the Average Gross Profit Ratio in the case of the said Assessee dealing with turnover of pure gold was less than 1%. He further submitted that the Best Judgment Assessment framed by the Assessing Authority has to be a fair and reasonable estimate of the profit.

9. On the other hand, Mr.T.R.Senthil Kumar, learned Senior Standing Counsel for the Respondent-Revenue, supported the impugned orders and submitted that had the Assessee disclosed the details of the purchasers, the Assessing Authority not only could have inquired into the matter further, but could have also given credit of the Tax Collected at Source to the respective purchasers, on whose behalf the present Assessee acted, and the Assessee, in any case, was not entitled to claim any credit of such Tax Deducted at Source by M/s.Manappuram Finance Ltd., the Seller of gold. The learned Standing Counsel also submitted that the Assessee was given due Show Cause Notice with regard to estimating profit, assessable in his hands at the rate of 3.5%, but he failed to prove with evidence his claim of 1% Profit Ratio, as disclosed by him.

10. Having heard the learned counsel for the parties and upon perusal of the orders passed by the authorities below, we are satisfied that no Substantial Question of Law arises in the present case, requiring our consideration under Section 260A of the Act.

11. Estimate of Profit Ratio remains a fact finding exercise and unless the perversity in the findings of the Tribunal, from which the Substantial Question of Law can be said to be arising, is established by the Assessee on the basis of material on record or evidence adduced by him, in our considered opinion, no Substantial Question of Law arises in such matters.

12. This Court does not have any material on record to establish either 1% or 3.5%, as being the reasonable rate of income. It is for the Assessing Authority to make any such 'Estimate of Income' in the hands of the Assessee. We find from record that the Assessee was given a Show Cause Notice in this respect, but, except contending before the Assessing Authority that 3.5% of income was unreasonable, the Assessee failed to adduce any evidence before the said Authority for establishing that 1% was only reasonable Estimate of Income, assessable in his hands. We also cannot appreciate the claim of the Assessee to be only acting as an Agent, as he could not disclose the details of identifiable purchasers of gold, which was sold by the Finance Company as mortgagee with whom such gold is said to have been pledged for Loans and Advances and upon defaults committed by the borrowers, the mortgagee Finance Company was entitled to sell the gold in question in open market. The Assessee, claiming to be only acting as an Agent, in the absence of any disclosure about the identity of the purchasers, could only be treated as engaged in the said business of his own and, therefore, the Estimate of Income in the business of purchase and sale of gold was required to be assessed by the Assessing Authority. Estimate of Income, in such cases, even undertaking Best Judgment Assessment exercise while rejecting the Books of Accounts and Profits of the Assessee, is a fact finding exercise to be made, based on material to be placed on record by the Assessee. In the absence of any evidence placed by the Assessee in this regard, the Assessee cannot simply contend that Estimate of Income at 3.5% is unreasonable or perverse.

13. The three authorities below have consistently upheld the said 'Ratio of Profit', to be assessable in the hands of the Assessee, and the Assessee has consistently failed before the authorities below to produce any cogent material to establish that 1% was reasonable Ratio of Profit in the said trade.

14. Reliance placed by the learned counsel for the Assessee on the order of the Tribunal at Hyderabad in Income Tax Officer v. M/s.Vonamala Jagadishwaraiah, cited supra, is hardly of any help to the Assessee, as the Assessee therein apparently dealt with large scale of turnover of pure gold and the Table extracted by the Tribunal in its order for Assessment Year 2009-2010 was dealing with Assessment Years from 2007-2008 to 2011-2012, where the turnover of over Rs.300.00 crores to Rs.500.00

crores was involved, whereas, the turnover in the present case is only to the extent of Rs.23.00 crore and odd. Therefore, the 'Ratio of Profit' of the said Assessee, as was being dealt with by the learned Tribunal in that case, cannot be a yardstick to estimate the income of the Assessee in the present case. Even the said order of the Tribunal does not appear to have remitted the case to any of the authorities below, which, per se, does not result in any perversity in the orders passed by the authorities below in the case before us. Therefore, we do not find any Substantial Question of Law arising in this case and, accordingly, we do not find any merit in this Appeal filed by the Assessee.

15. Appeal of the Assessee is dismissed. No costs.

Sd/-
Assistant Registrar

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Sub Assistant Registrar

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To

- 1.The Deputy Commissioner of Income Tax,
Non Corporate Circle I,
Coimbatore.
- 2.Income Tax Appellate Tribunal,
Chennai 'C' Bench,
Chennai.
- 3.The Commissioner of Income Tax(Appeals)-2,
Coimbatore.

+1cc to Mr.T.R.Senthil Kumar, Advocate sr.32363

kk(co)
nr 29/05/2019

T.C.A.No.676 OF 2018

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