IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 24.06.2019

CORAM :

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

TCA.No.722 of 2018

The Commissioner of Income Tax,
Chennai .. Appellant

Vs.

Shri Hussain Mohideen Ibrahim Sha,
C/o Ramesh & Ramachandran,
Charted Accountants, New No.39, Old No.29/3,
Viswanathapuram Main Road,
Kodambakkam, Chennai - 600 024.
PAN: AAFPI9651L .. Respondent

Prayer : Tax Case Appeal filed under Section 260A of the Income Tax Act, 1961, against the order of the Income Tax Appellate Tribunal Madras 'A' Bench, Chennai, dated 27.02.2018 in I.T.A.No.449/Mds/2017 for the assessment year 2008-2009 the commissioner of Income Tax Appeals 2, 121,MG.Road, Nungambakkam, chennai PAN: AAFPI9651L.dated 08.12.2015 Assessment year 2008-2009 against the Assistant Commissioner of Income Tax,Business circle I,Chennai. Dated 28.02.2014 PAN: AAFPI9651L Assessment Year 2008-2009.

For Appellant : Ms. Hemalatha
Senior Standing Counsel

For Respondent : Mr.A.S.Sriraman

* * *

JUDGMENT

[Judgment of the Court was delivered by T.S.Sivagnanam, J.]

This appeal filed by the Revenue under Section 260 A of the Income Tax Act, 1961 (hereinafter referred to as "the Act") is directed against the order dated 27.02.2018 in ITA.No.449/Mds/2017 passed by the Income Tax Appellate Tribunal Madras, 'A' Bench in the assessment year 2008-2009.

2.The assessee has filed this appeal by raising the following substantial questions of law:

> "1. Whether the Tribunal was right in deleting the addition of expenditure made under Section 69C based on a perverse finding of fact which is not supported by the evidence on record that it is recorded in the regular books of account maintained which is contrary to the declaration given at the time of survey and the evidence collected by the department?
>
> 2. Is not the finding of the Tribunal perverse by holding that the transactions are recorded in the regular books of accounts especially when the declaration given by the Assessee during survey operations and the evidences collected by the department will clearly prove the contrary to the fact that the transactions are not recorded in the books of account maintained? "

3.We have heard Ms.Hemalatha, learned Senior Standing counsel appearing for the appellant/revenue and Mr.A.S.Sriraman, learned counsel appearing for the respondent/assessee. With the consent on either side, the appeal itself is taken up for final disposal.

4. The question which was required to be decided by the Tribunal is with regard to applicability of Section 115BBE of the Act, which came into effect from 01.04.2017 (typographical error in the order of the Tribunal shown as 01.04.2013). From reading paragraph 6 of the order passed by the Tribunal, we find that the Tribunal proceeded to consider the expenditure incurred by the assessee, which the assessee claimed that it was recorded in the books of accounts. Based on such submission, the Tribunal held that when the expenditure was recorded in the books of account, which was maintained in the course of regular business, it cannot be said that the assessee could not explain the source of income for meeting such expenditure. Unfortunately, what was the subject matter, which was placed before the Tribunal is with regard to effect of

Section 115BBE of the Act. According to the assessee, this provision was introduced with effect from 01.04.2017 and therefore, not applicable to the assessment year under consideration namely 2008 -2009.

5. The Revenue argued before the Tribunal stating that Section 115BBE of the Act was brought into statute book to clarify the ambiguity prevailed in respect of unexplained expenditure. In other words, it was the contention of Revenue that the said provision being clarificatory would be retrospective. Therefore, the endeavour of the Tribunal should have been to test the submission made by the assessee and the Revenue in this regard.

6. However, what weighed in the mind of the Tribunal was with regard to the expenditure, which according to the assessee, was recorded in the books of accounts maintained in the course of regular business. The assessment was reopened solely on the ground that under Section 115BBE of the Act having been brought into the statute book, the expenditure under Section 11BBE., etc. should be assessed separately.

7. At this juncture, it will be beneficial to refer to a recent circular issued by the CBDT in Circular No.11 of 2019 dated 19.06.2019, wherein the Board has clarified on the following lines:

> "Thus keeping the legislative intent behind amendment in Section 11BBE(2) vide the Finance Act, 2016 to remove any ambiguity of interpretation, the Board is of the view that since the term 'or set off of any loss' was specifically inserted only vide the Finance Act 2016, w.e.f. 01.04.2017, an assessee is entitled to claim set-off of loss against income determined under Section 115BBE of the Act till the assessment year 2016-17."

8. Learned counsel appearing for the respondent/assessee referred to a decision rendered by Division Bench of this Court in Commissioner of Income Tax Vs. Chensing Ventures reported in [2007] 291 ITR 258 (Madras), wherein, the loss sustained by the assessee, in

any year under, the heads of income was permitted as set off against income under any other head. Learned counsel for assesssee also referred to a decision of Division Bench in High Court of Gujarat in Commissioner of Income Tax -II Vs. Shilpa Dyeing & Printing Mills (P) Limited reported in [2013] 39 taxmann.com 3 (Gujarat).

9. After elaborately hearing learned counsel for the parties, we are of the considered view that the matter requires reconsideration by the Tribunal for the reasons, which we have indicated in this judgment. Furthermore, the CBDT has issued Circular No.11 of 2019 dated 19.06.2019 also needs to be looked into as regards the effect of the introduction of Section 115BBE of the Act.

10. In the light of the above, the appeal filed by the Revenue is allowed, the order of the Tribunal is set aside and the matter is remanded back to the Tribunal for fresh consideration for the issues we have pointed out in this judgment. Consequently, the substantial questions of law are left open. No costs.

Sd/-
Assistant Registrar(CS)

//True Copy//

Sub Assistant Registrar

To,

1.THE COMMISSIONER OF INCOME TAX, CHENNAI
2. THE INCOME TAX APPELLATE TRIBUNAL MADRAS A BENCH, CHENNAI
3.THE COMMISSIONER OF INCOME TAX APPEALS 2, 121,MG.ROAD, NUNGAMBAKKAM, CHENNAI
4.THE ASSISTANT COMMISSIONER OF INCOME TAX BUSINESS CIRCLE I CHENNAI

+1cc to Mr.T.Ravi kumar , Advocate SR.No. 51516
+1cc to Mr.S.Sridhar , Advocate SR.No. 51544

TCA.No.722 of 2018

A.SK(27/08/2019)