IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 22.08.2019

CORAM

THE HONOURABLE MR.JUSTICE M.SUNDAR

W.P.No.24772 of 2019
&
W.M.P.Nos.24412 and 24414 of 2019

Mr.Ashok Kumar Jain
No.32, Narayana Mudali Street
Sowcarpet, Chennai - 600 079 ... Petitioner

-Vs-

1. The Commissioner of Income Tax Appeals - V
Room No.215, 2nd Floor, Ayankar Bhavan
No.121, M.G.Road, Nungambakkam
Chennai - 600 034

2. The Chief Commissioner of Income Tax-I
Chennai

3. The Income Tax Officer
Business Award - X(1)
Chennai ...Respondents

PRAYER: Writ Petition filed under Article 226 of the Constitution of India praying for issuance of a Writ of Certiorari calling for the records pertaining to the order hearing ITA No.03/2018, 19/A-5 dated 18.07.2019 for the Assessment Year 2006-2007 passed by the 1st Respondent and quash the same as null and void.

For Petitioner : Mr.P.J.Sri Ganesh

For Respondents : Ms.Hema Muralikrishnan
Senior Standing Counsel (IT)

O R D E R

Mr.P.J.Sri Ganesh, learned counsel on record for writ petitioner and Ms.Hema Muralikrishnan, learned senior Standing Counsel, who has accepted notice on behalf of all the three respondents, are before this Court.

2.With consent of learned counsel on both sides, main writ petition itself is taken up, heard out and is being disposed of.

3.After hearing both sides, it comes to light that the entire matter turns on a very narrow compass now. Therefore, short facts shorn of elaboration will suffice.

4.Writ petitioner is an assessee under 'Income Tax Act, 1961' ('IT Act' for brevity), that an Assessment Order came to be passed against the writ petitioner with regard to Assessment Year 2006-07, that writ petitioner carried the matter in appeal to the Appellate Authority, namely Commissioner of Income Tax (Appeals) and thereafter, has also filed a further appeal, obviously post orders of Appellate Authority and that this further appeal is to 'Income Tax Appellate Tribunal, Chennai' ('ITAT' for brevity). The assessment order is dated 21.03.2014 and the order of ITAT is dated 04.03.2019 in ITA No.1426/Chny/2018. The operative portion of the order of ITAT is contained in Paragraph 5 of the impugned order and the relevant portion of Paragraph 5 reads as follows:

> '5........ Accordingly, the orders of both the authorities below are set aside and the entire issue is remitted back to the file of the Assessing Officer. The Assessing Officer shall bring on record the role of the assessee in promoting the company and relationship of the assessee with the other promotors role of the assessee in inflating the price of shares etc. The Assessing Officer shall also furnish a copy of the report said to be received from DIT (I&CI), New Delhi to the assessee and thereafter decide the issue afresh in accordance with law, after giving a reasonable opportunity to the assessee.'

5. Therefore, it comes out clearly that ITAT, remanded the matter back to the Original Authority, namely the Assessing officer. To be noted, the impugned order pertains to penalty under Section 271(1)(c) of IT Act.

6. Adverting to the 'order passed by the first respondent dated 18.07.2019 in ITA No.03/2018-19/A-5' (hereinafter 'impugned order' for brevity), learned counsel for writ petitioner submits that it has been passed on the erroneous assumption that the writ petitioner has not carried the matter to ITAT. This comes out clearly from Paragraph 4 of the impugned order and the relevant portion reads as follows:

> '4...... On appeal, the Commissioner of Income Tax (Appeals)-5, Chennai vide his order dated 26.10.2016 dismissed the quantum appeal by confirming the addition made at Rs.15,39,444/- on account of

disallowance of claim of exemption of long term capital gains u/s.10(38) of the IT Act, 1961. The appellant did not appeal further.'

(Underlining made by this Court to highlight and supply emphasis)

7. Ms.Hema Muralikrishnan, learned counsel, who has accepted notice on behalf of all the respondents, submitted that ITAT has remanded the matter back to the Original Authority, namely the Assessing Officer, subject matter of appeal before ITAT is the assessment order for the assessment year concerned, namely 2006-2007 and it is always open to the third respondent to commence penalty proceedings subject of course to the orders of the Assessing officer post remand by ITAT. Though obvious, it is clear that it depends on the nature of the order which the Assessing Officer passes.

8. However, the sole pivotal point in the instant writ petition is, impugned order has been passed by the first respondent on the erroneous presumption that writ petitioner has not carried the matter in appeal after first Appellate Authority, namely Commissioner of Income Tax Appeals, whereas there is a further appeal to ITAT which has passed an order setting aside the Assessment Order and remanding the matter to Assessing officer as mentioned supra.

9. Absent assessment order there can be no penalty proceedings. Therefore, in the light of the narrative thus far, the impugned order dated 18.07.2019 bearing reference ITA No.03/2018-19/A-5 is set aside. It is made clear that impugned order is set aside on the sole ground that it has been passed on a wrong premise that writ petitioner has not appealed further after order of first Appellate Authority or in other words, it has been passed without appreciating the factual matrix that writ petitioner carried the matter to ITAT from Commissioner of Income Tax Appeals.

This writ petition is allowed albeit with the rider that it is open to the third respondent to initiate penalty proceedings if the need arises subject to and after orders are passed by the Assessing Officer post remand by ITAT. No costs. Consequently, connected miscellaneous petitions are closed.

gpa

Sd/-
Assistant Registrar

//True Copy//

Sub Assistant Registrar

To

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   No.121, M.G.Road, Nungambakkam
   Chennai - 600 034

2.The Chief Commissioner of Income Tax-I
   Chennai

3.The Income Tax Officer
   Business Award - X(1)
   Chennai

+1cc to Ms.Hema Muralikrishnan, Advocate, SR.No.72051
+1cc to Mr.P.J.Rishikesh, Advocate, SR.No.71895
+1cc to the Govt.Pleader, Vide Sr.No.74069

W.P.No.24772 of 2019 &
W.M.P.Nos.24412 and 2441 of 2019

Kak(24/09/2019)