IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 22.11.2019

CORAM :

THE HONOURABLE MR.JUSTICE N.KIRUBAKARAN
and
THE HONOURABLE MR.JUSTICE P.VELMURUGAN

T.C.A.No.765 of 2019

Commissioner of Income Tax
Corporate Circle 3 (1)
Chennai 600 034.
... Appellant

Vs

M/s.Tamil Nadu Water Investment Co Limited
1st Floor Polyhose Towers,
No.86, Mount Road,
Guindy Chennai 600 032
PAN: AABCT 8153 B ...Respondent

PRAYER: Tax Case Appeal filed under Section 260A of Income Tax Act, 1961 against the order dated 12.04.2019 in ITA. No.3106/Chny/2017 on the file of the Income Tax Appellate Tribunal Chennai 'D' Bench for the assessment year 2008-09 made against the Consolidated order of the CIT(A)-11,ITA No.135,129,201/CIT(A)-11/2016-17 dated 29.08.2017 for the assessment year 2008-09 by the Commissioner of Income Tax (Appeals)-11,Chennai-34, against the Assessment Order of the Assistant Commissioner of Income Tax,Corporate Circle-3(1), Chennai-34 in GIR No/PAN AABCT815313 dated 24.03.2016 for the Assessment year 2008-09.

For Appellant : Mr.M.Swaminathan, Senior Standing Counsel.

For Respondent : Mr.M.P.Senthil Kumar

J U D G M E N T
(Judgment of the Court was delivered by N.KIRUBAKARAN, J)

This appeal has been filed against the order passed by the Income Tax Appellate Tribunal in allowing the assessee's appeal which has been filed against the order of the Commissioner of Income Tax (Appeals) wherein the appeal of the assessee has been partly allowed.

2.The facts of the case are as follows:

The assessee company is an investment company promoted jointly by the Government of Tamil Nadu and M/s.Infrastructure Leasing and Financial Services Limited. The assessee company filed its return of income for the assessment year 2008-09 on 30.09.2008 admitting a total income of Rs.0/- (Nil). The return was processed under Section 143 (1) of Income Tax Act, 1961. The assessment under Section 143 (3) was completed on 28.07.2010 after determining the total income of Rs.4,87,10,020/-. The order under Section 154 was while determining total income of Rs.44,51,710/-. However subsequently the assessment was reopened under Section 147 of the Income Tax Act by issue of notice under Section 148, dated 16.03.2015 and served on the assessee for the following reasons: (i)The assessee had not declared any income though there has been receipt of grant. (ii)Part of Professional fees relating to project implementation supervision of Nanded Project has not been written by the assessee.

3.From the records, it is seen that the assessee had accounted a sum of Rs.81.71 Crore under the head 'Grant' (Schedule D of Balance Sheet). The previous year balance on 31.03.2007 was Rs.38.33 Crore. In other words, the difference between Rs.81.17 Crores and Rs.38.33 Crore is Rs.42.84 Crore which was received during the Finance year 2007-08. The assessee had not offered any income as part of grant received in the P&L account. Schedule D of balance sheet shows the Grant received from Government of India for IIUS and the Grant received from Government of Tamil Nadu under the ASIDE Scheme.

4.Further, under Schedule K - Notes to accounts, in Note 1 (d), under the head 'Grant', it is stated 'Government grant received as promoters contributions are credited to capital reserve. The same are accounted as per accounting standard 12 "Accounting for government grants" issued by the Institute of Chartered Accountants of India'.

5.As per Note 2, a grant of Rs.30 Crore was received from Government of India under ASIDE scheme for placing as equity / quasi equity funds in the Tirupur Effluent Treatment Project. The same has been placed as grant on back to back basis. The assessee had not shown any increase in income from the grant received nor reduced such grant from block of assets if it is a capital subsidy. Subsidy can be revenue or capital. Any other receipt under the head grant should be taxed. So, grant of Rs.30 Crore was received from Government of India under ASIDE scheme and grant of Rs.12,84,68,713/- was received from Government of India for IIUS is added back to income.

6.It is observed that in S.No.9 of the Schedule K-Notes to accounts, the assessee mentioned that an income of Rs.1,14,54,176/- being part of the professional fees for the project implementation supervision of the Nanded Project has not been recognized during the financial year due to a dispute pertaining to the basis of building.

7.The assessee is a domestic company following mercantile system of accounting. As per accrual accounting and the revenue recognition principle as service has already been rendered, the assessee ought to have included the same as income. Dispute in billing cannot be held as reason for non-recognition of revenue. So, the amount of Rs.1,14,54,176/- is now added back to income.

8.Thus, the Assessing officer added a sum of Rs.42,84,68,713/- under Addition on grant received from Government of India and Rs.1,14,54,176/- under disallowance on professional fees. The Assessing officer completed the assessment under Section 143 (3) read with Section 147 on 24.03.2016.

9.Aggrieved by the order of the Assessing Officer the assessee preferred an appeal before the Commissioner of Income Tax (Appeals) in ITA No.135/CIT (A) / 16-17. The Commissioner of Income Tax (Appeals) by his order dated 29.08.2017 confirmed the order of the Assessing Officer including the jurisdiction under Section 147.

10.Aggrieved by the order of the CIT(A) the assessee preferred an appeal before the Income Tax Appellate Tribunal in ITA No.3106/Chny/2017. The Income Tax Appellate Tribunal by its order dated 12.04.2019 allowed the appeal of the assessee by holding that the Assessing Officer has not recorded any failure on the part of the assessee to disclose fully and truly any material facts necessary for its assessment. Hence, aggrieved by the order of the Income Tax Appellate Tribunal, this present appeal has been filed.

11.Heard Mr.M.S.Swaminathan, learned Senior Standing Counsel for the appellant and Mr.M.P.Senthil Kumar, learned Counsel for the respondent and by consent, the matter is taken up for final disposal.

12.This appeal is admitted on the following substantial questions of law;

> "(i)Whether on the facts and circumstances of the case and in law, the Income Tax Appellate Tribunal was justified by quashing the assessment order by holding that the Assessing Officer has not recorded any failure on the part of the assessee to disclose fully and truly

any material facts necessary for its assessment?

(ii)Whether on the facts and circumstances of the case and in law, the Income Tax Appellate Tribunal was justified in overlooking the fact that assessee has indeed not disclosed grant income of Rs.42.84 Crores and had therefore not fully and truly disclosed all material facts necessary for assessment?

(iii)Whether on the facts and circumstances of the case and in law, the Income Tax Appellate Tribunal was justified in overlooking the fact that assessee has indeed not disclosed professional fees of Rs.1,14,54,176/- and had therefore not fully and truly disclosed all material facts necessary for assessment?"

13.Mr.M.Swaminathan, learned Counsel for the appellant would submit that four years time limit has been given for the assessing officer to reopen the assessment, if there is escapement of income and further two years time limit to reopen the assessment is available, in case of failure on the part of the assess to disclose fully and truly all material facts necessary for its assessment. The learned Counsel for the appellant would submit that as per Explanation 1 to Section 147, power is available to the assessing officer to reopen the assessment, since mere production of books of accounts and materials will not amount to disclosure within the meaning of proviso to Section 147 of Income Tax Act, 1961.

14.It is seen from the records that the assessing officer has not given any finding in the reasons recorded that income chargeable to tax had escaped assessment by reason of failure on the part of the Assessee to disclose fully and truly all material facts necessary for completion of assessment. The Tribunal extracted the relevant portion of the order of the Assessment officer and the same is usefully extracted as follows:

" Sir,

Sub: Reasons for re-opening - A.Y. - 2008-09 - reg.

Reasons for reopening of the case A Y 2008-09:

The reasons for reopening the assessment for the Asst. Year 2008-09 is furnished as under;

The assessee had accounted a sum of Rs.81.71 crore under the head Grants (Schedule D of Balance Sheet). The previous year balance on 31.03.2007 was Rs.38.33 Crore. In other words, the difference between Rs.81.71 crore and Rs.38.33 Crore is Rs.42.84 Crore which was received during the FY 2007-08. The assessee had not offered any income as part of grant received in the P&L account.

Schedule D of balance Sheets shows the Grant received from Government of India for IIUS and the Grant received from Government of Tamil Nadu under the ASIDE scheme. Further, under Schedule K - Notes to accounts, In Note 1 (d), under the head 'Grnts, it is stated 'Government grants received as promoters contribution are credited to capital reserve. The same are accounted as per accounting standard 12 "Accounting for Government grants: issued by the institute of Chartered Accounts of India (also, refer to note 2)'. As per note 2, a grant of Rs.30 Crore (as at 31.03.2007 - Nil) was received from Government of India ASIDE scheme for placing a equity/quasi equity funds in the Tirpur Effluent Treatment Project. The same has been placed as Grant on back to back basis. The assessee had not shown any increase in income from the grant received nor reduced such grant from block of assets. It is a capital subsidy can be revenue or capital. Any other receipt under the head grants should be taxed.

2.In S.No.9 of the Schedule K - notes to accounts, the assessee has mentioned that an income of Rs.1,14,54,176 being part of the professional fees for the project implementation supervision of the Nanded Project has not been recognized during the financial year due to a dispute pertaining to the basis of billing. The assessee is a domestic company following mercantile system of accounting. As per accrual accounting and the revenue recognition principle as service has already been rendered, the assessee ought to have included the same as Income. Dispute in billing cannot be held as reason for non-recognition of revenue."

15.Having extracted the above reasons given by the assessing officer, the Tribunal found that the reasons recorded by the assessing officer for reopening the assessment does not contain the legal satisfaction as required under Section 147. The appellate Tribunal relied upon the decision of this Court in the case of "CIT Vs. M/s.Eco Media P.Ltd.," in T.C.A.No.825 of 2005 dated 09.04.2012 and the relevant portion of the decision extracted by the Tribunal is usefully extracted as follows:

"14.Section 147 of the Income Tax Act came up for consideration before this Court in the decision reported in [2006] 286 ITR 674 CIT v. ELGI FINANCE LIMITED as well as in [2010] 320 ITR CIT v. KELVINATOR OF INDIA LIMITED. The decision reported in [2006] 286 ITR 674 CIT v. ELGI FINANCE LIMITED was applied in the decision of this Court reported in [2008] 306 ITR 136 CIT v. T.N.TRANSPORT DEVELOPMENT FINANCE CORPORATION LTD., wherein this Court pointed out to the law relating to the reassessment proceedings. This Court, in the decision reported in

[2006] 286 ITR 674 CIT v. ELGI FINANCE LIMITED, pointed out that mere escapement of income, by itself, is insufficient to justify the initiation of reassessment proceedings after the expiry of four years from the end of the assessment year. This Court held that such escapement must be shown as by reason of failure on the part of the assessee either to file a return referred to in the proviso or to truly and fully disclose the material facts necessary for assessment. This Court further pointed out that whenever a notice is issued by the Assessing Officer beyond a period of four years from the end of the relevant assessment year, such notice must contain reasons for his belief that income had escaped assessment. There can be no presumption in law that there was failure on the part of the assessee to fully and truly disclose the material facts. Thus, referring to the main paragraph of Section 147 of the Act as well as the proviso, this Court held that it is necessary for the Assessing Officer to record that anyone or all the circumstances referred to in the proviso existed before the issue of notice under Section 147 of the Act. This Court further pointed out that the question as to whether the assessee had disclosed fully and truly all material facts is a question of fact and unless the facts disclosed had been examined in relation to the extent of failure, if any, on the part of the assessee, it is not possible to form an opinion that there had been a failure on the assessee's part to truly and fully disclose the material facts. This Court pointed out that a notice issued without a recording of the Assessing Officer's reasonable belief that there was such failure on the part of the assessee, would be indicative of a failure on the part of the Assessing Officer to apply his mind to material facts, and on that ground alone the notice issued would be vitiated.

15. Applying the decision reported in [2006] 286 ITR 674 CIT v. ELGI FINANCE LIMITED as well as the decision reported in [2008] 306 ITR 136 CIT v. T.N.TRANSPORT DEVELOPMENT FINANCE CORPORATION LTD., to the facts herein, on a reading of the order of the Assessing Authority as well as that of the Commissioner of Income Tax (Appeals), we have no hesitation in holding that there is absolutely no material to indicate that basic facts necessary for assumption of jurisdiction under Section 147 of the Act is absent in this case. Consequently, applying the decisions referred to above to the facts herein, we have no hesitation in upholding the order of the Tribunal."

16.Even though Mr.M.Swaminathan, learned Senior Standing Counsel for the appellant would submit that the power is available to the assessing officer to reopen it, there is no material produced either before this Court or before the Tribunal to find out that the income had escaped assessment by reason of failure on the part of the assessee himself. Therefore, we are in complete agreement with the finding given by the Appellate Tribunal and hence, the order passed by the Appellate Tribunal has to be confirmed. Hence, the questions of law framed are answered in favour of the assessee and against the department of Revenue.

17.In the result, this appeal is dismissed. No costs.

Sd/-
Assistant Registrar

/TRUE COPY/

Sub-Assistant Registrar

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To
1.Commissioner of Income Tax
Corporate Circle 3 (1)
Chennai 600 034.

2.Income Tax Appellate Tribunal,
Chennai 'D' Bench

3.Commissioner of Income Tax(Appeals)-11
Chennai-34

4.The Assistant Commissioner of Income Tax Corporate Circle 3(1), Chennai-34

+1cc to Mr.G.BASKAR, ADVOCATE, SR.NO. 97345
+1CC TO MR.M.SWAMINATHAN, ADVOCATE, SR.NO. 97825

T.C.A.No.765 of 2019

AK-II(CO)
KK 16.04.2021