IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 28.01.2020

CORAM

THE HON'BLE DR.JUSTICE VINEET KOTHARI
AND
THE HON'BLE MR.JUSTICE R.SURESH KUMAR

Tax Case Appeal No.1159of 2010

V.Sekaran ... Appellant

Vs.

The Income Tax Officer,
Ward I (2),
Namakkal. ... Respondent

Appeal filed under Section 260A of the Income Tax Act, 1961 against the order of the Income Tax Appellate Tribunal 'D' Bench, Chennai dated 10.12.2009 in M.P.No.224/Mds/2008 in I.T.(SS)A. Nos.85 & 77/Mds/2003 for Block Assessment Period 01.04.1990 to 21.09.2000,

against the order of the Commissioner of Income Tax (Appeals)-II, Coimbatore dated 17.02.2003 in Appeal No.ITA.302-C/02-03 for the Assessment Block Year 1990-91 to 2001-02 (upto 21/09/2000) and

against the Assessment order of the Deputy Commissioner of Income Tax, Central Circle, Salem dated 31/10/2002 and made in PAN/GIR No.CCPS-016 for the Assessment Year Block Assessment for Block period 01/04/1990 to 21/09/2000.

For Appellant : Mr.M.P.Senthil Kumar

For Respondent : Mrs.S.Premalatha
Junior Standing Counsel

JUDGMENT

(Judgment of the Court was delivered by DR.VINEET KOTHARI,J.)

The Assessee V.Sekaran has filed the present appeal against the order dated 10.12.2009 passed by the learned Income Tax Appellate Tribunal whereby the Tribunal decided the question against the Assessee on the issue of levy of surcharge in the case of block assessment, in view of the judgment of the Hon'ble Supreme Court in the case of CIT Vs. Suresh N.Gupta (297 ITR 32).

2.The said judgment of Suresh N.Gupta came to be reversed later on by the Hon'ble Supreme Court on 29th October, 2014 in the case of Commissioner of Income Tax, Bangalore Vs. K.Raheja Hotels & Estate (P.) Ltd., [(2015) 228 Taxman 5 (SC)]. The relevant portions of the judgment of the Hon'ble Supreme Court in the case of K.Raheja Hotels & Estate (P.) Ltd., are quoted below for ready reference:

> "Thus, it was a conscious decision of the legislature, even when the legislature knew the implication thereof and took note of the reasons which led to the insertion of the proviso, that the amendment is to operate prospectively. Learned counsel appearing for the assessees sagaciously contrasted the aforesaid stipulation while effecting amendment in Section 113 of the Act, with various other provisions not only in the same Finance Act but Finance Acts pertaining to other years where the legislature specifically provided such amendment to be either retrospective or clarificatory. In so far as amendment to Section 113 is concerned, there is no such language used and on the contrary, specific stipulation is added making the provision effective from 1st June, 2002.
>
> (e) There is yet another very interesting piece of evidence that clarifies the provision beyond any pale of doubt, viz. understanding of CBDT itself regarding this provision. It is contained in CBDT circular No.8 of 2002 dated 27th August, 2002, with the subject "Finance Act, 2002 - Explanatory Notes on provision relating to Direct Taxes". This circular has been issued after the passing of the Finance Act, 2002, by which amendment to Section 113 was made. In this circular, various amendments to the Income Tax Act are discussed amply demonstrating as to which amendments are clarificatory/retrospective in operation and which amendments are prospective. For example, explanation to Section 158BB is stated to be clarificatory in nature. Likewise, it is mentioned that amendments in Section 145 whereby provisions of that section are made applicable to block assessments is made clarificatory and would take effect retrospectively from 1st day of July, 1995. When it comes to amendment to Section 113 of the Act, this very circular provides that the said amendment along with amendments in Section 158BE, would be prospective i.e. it will take effect from 1st June, 2002.
>
> (f) Finance Act, 2003, again makes the position clear that surcharge in respect of block assessment of

undisclosed income was made prospective. Such a stipulation is contained in second proviso to sub-section (3) of Section 2 of Finance Act, 2003. This priviso reads as under:

"Provided further that the amount of income-tax computed in accordance with the provisions of section 113 shall be increased by a surcharge for purposes of the Union as provided in Paragraph A, B, C, D or E, as the case may be, of Part III of the First Schedule of the Finance Act of the year in which the search is initiated under Section 132 or requisition is made under section 132A of the income-tax Act."

Addition of this proviso in the Finance Act, 2003 further makes it clear that such a provision was necessary to provide for surcharge in the cases of block assessments and thereby making it prospective in nature. The charge in respect of the surcharge, having been created for the first time by the insertion of the proviso to Section 113, is clearly a substantive provision and hence is to be construed prospective in operation. The amendment neither purports to be merely clarificatory nor is there any material to suggest that it was intended by Parliament. Furthermore, an amendment made to a taxing statute can be said to be intended to remove 'hardships' only of the assessee, not of the Department. On the contrary, imposing a retrospective levy on the assessee would have caused undue hardship and for that reason Parliament specifically chose to make the proviso effective from 1.6.2002.

40.The aforesaid discursive of ours also makes it obvious that the conclusion of the Division Bench in Suresh N. Gupta treating the proviso as clarificatory and giving it retrospective effect is not a correct conclusion. Said judgment is accordingly overruled.

41.As a result of the aforesaid discussion, the appeals filed by the Income Tax Department are hereby dismissed. Appeals of the assessees are allowed deleting the surcharge levied by the assessing officer for this block assessment pertaining to the period prior to 1st June, 2002."

3.In view of this, the matter deserves to be sent back to the learned Tribunal for deciding the appeal again, in the light of the latest decision of the Hon'ble Supreme Court in the case of Commissioner of Income Tax, Bangalore Vs. K.Raheja Hotels & Estate (P.) Ltd.

4.Accordingly, we dispose of the present Appeal and setting aside the order of the learned Income Tax Appellate Tribunal dated 31.12.2007 and the order dated 10.12.2009 passed in M.P.No.224/Mds/2008 in I.T.(SS).A.Nos.85 & 77/Mds/2003. On this aspect of the matter, we remand the case back to the learned Tribunal for deciding afresh in accordance with law. No costs.

Sd/-
Assistant Registrar(CS VI)

//True Copy//

Sub Assistant Registrar

To

1.The Income Tax Appellate Tribunal,
'D' Bench, Chennai.

2.The Income Tax Appellate Tribunal,
Chennai.

3.The Commissioner of Income Tax (Appeals)-II,
Coimbatore.

4.The Deputy Commissioner of Income Tax,
Central Circle, Salem.

5.The Income Tax Officer,
Ward I(2),
Namakkal.

+1cc to Mr.M.Swaminathan, Advocate Sr.6512

T.C.A.No.1159 of 2010

pa[co]
srg 04/03/2020