

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 08.12.2020

CORAM:

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

Tax Case Appeal Nos.339 and 342 of 2019

Commissioner of Income Tax,
Chennai

..Appellant in both appeals

Vs.

M/s United India Insurance Company
24, Whites Road,
Chennai - 600 014

..Respondent in both the appeals

Tax Case Appeals filed under Section 260A of the Income Tax Act, 1961, against the common order made in ITA Nos.1571 and 1085/Chny/2017 dated 28.08.2018 passed by the Income Tax Appellate Tribunal, 'A' Bench, Chennai for the Assessment Year 2013-2014 against the order dated 28/03/2017 and made in ITA No.10/16-17/CIT(A)-11 on the file of the Commissioner of Income Tax (Appeals)-11, Chennai and against the order dated 27/03/2016 and made in GIT No/PAN AAACV5552C on the file of the Assistant Commissioner of Income Tax, Corporate Circle-3(2) respectively (in both appeals).

For Appellant : Mr.M.Swaminathan
Senior Standing Counsel

For Respondent : Mr.M.V.Swaroop

C O M M O N J U D G M E N T

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

These appeals, at the instance of the revenue filed under Section 260A of the Income Tax Act, 1961 (the 'Act' for brevity) challenging the common order passed by the Income Tax Appellate Tribunal, 'A' Bench, Chennai in ITA Nos.1571 and 1085/Chny/2017 dated 28.08.2018 for the Assessment Year 2013-2014 respectively.

2. The Revenue had raised Five Substantial Questions of Law for consideration. When the appeals came up for admission before us, on 21.06.2019, we had admitted the appeals only with regard to Substantial Question of Law No.3 and decided the other questions on the following lines:

"3. We have heard Mr.M.Swaminathan, learned Senior Standing Counsel for the Revenue and Mr.M.V.Swaroop, learned counsel accepting notice for the respondent - assessee.

4. The Revenue does not dispute the position that substantial questions of law Nos.2 and 4 namely the issues pertaining to the tax at source on the payment made to surveyors and the tax at source towards the commission paid were decided by us against the Revenue in the assessee's own case in TCA.No.341 of 2019 by judgment dated 14.6.2019. Following the same, substantial question of law Nos.2 and 4 are decided against the Revenue.

5. Though in the substantial questions of law raised for consideration, the Revenue raised question No.1 for the assessment year 2013-14, on instructions, the learned Senior Standing Counsel for the Revenue submits that this issue does not arise for the assessment year under consideration (2013-14). Hence, substantial question of law No.1 is left undecided and open.

6. This leaves us with substantial question of law No.5, which pertains to deletion of addition for the infra payments made by the assessee to the car dealers. After going through the assessment orders, we find that the disallowance was based upon an information received by the Assessing Officer from the Service Tax Authorities. The Assessing Officer stated that the Service Tax Authorities concluded after detailed investigation that no services were rendered by the car dealers to the assessee and therefore disallowed infra payments made by the assessee to the car dealers. It is not disputed by the Revenue that the investigation conducted by the Service Tax Authorities is yet to attain finality and continues to remain in the show cause stage even as on date. Therefore, the Assessing Officer was not right in holding that the Service Tax Authorities concluded that no services were rendered by the car dealers to the assessee. At best, the finding recorded in the show cause notice by the Service Tax

Authorities can be only a prima facie finding and unless and until an adjudication takes place and final orders are passed, there can be no conclusion arrived at against the assessee holding that no services were rendered by the car dealers to the assessee.

7. This issue was considered by the Commissioner of Income Tax (Appeals)-11 [for brevity, the CIT(A)] and in our considered view, the CIT(A) rightly held that there is no conclusive evidence, which has been brought out either by the Service Tax Department or by the Income Tax Department. At this juncture, we refer to the findings recorded by the CIT(A) in paragraph 12.7.7 of his order, which read as follows :

"I have considered both the points of view briefly mentioned above. After going through all the points of contention and perusing the relevant documents, I have come to the following conclusion :

a) The Assessing Officer has merely based his conclusion on the content of the show cause notice issued by the Service Tax Department. Till date, the Service Tax Department has not passed any order finding fault with the appellant. There is no evidence whatsoever pointing out that the aforesaid payment was not genuine or the motor dealers did not render the services.

b) The appellant has submitted all the necessary supporting documents to prove that the aforesaid payment was genuine and the services were actually rendered by the motor dealers. c) The C&AG and IRDAI have not found fault with the aforesaid payment.

d) As per the guidelines of the appellant company and the IRDAI, the outsourcing of services to the motor dealers was permitted.

e) The Assessing Officer has not even proved any violation of procedure let alone prohibition by law so as to invoke Explanation to Section 37(1) of the Act to disallow the aforesaid payment.

f) A mere reference by the Directorate of Service Tax Department to the Director General of Income Tax (Inv.) does not warrant disallowance of the aforesaid payment.

g) The Assessing Officer's observation that the TDS certificates were not given is not convincing when no specific opportunity was given to the appellant for furnishing the TDS certificates. When the Assessing Officer has Form 26AS, there is no justification for making such observation.

h) With regard to the preliminary finding by the Service Tax Department, there is no material at this juncture to justify the Assessing Officer's disallowance on the ground that the payment was not genuine and the service was not rendered. If any conclusive evidence comes out of investigation by the Investigation Wing of the Income Tax Department or by the Service Tax Department, the Assessing Officer has ample power under Section 147 of the IT Act to reopen the assessment based on fresh evidence if it is received in future."

8. The above findings rendered by the CIT(A) were affirmed by the Tribunal in the impugned order. On going through the findings of the CIT(A), we find that the interest of the Revenue has been fully protected, as the CIT(A) made an observation that the Assessing Officer has ample power under Section 147 of the Act to reopen the assessment based on fresh evidence, if it is received in future. We may add that if ultimately the Service Tax Department holds against the assessee, it is well open to the Assessing Officer to exercise his power under the Act. Thus, for the above reasons, we find that the decision rendered by the CIT(A) as confirmed by the Tribunal is perfectly valid and substantial question of law No.5 is decided against the Revenue.

9. In the light of the above discussions, we hold that

(i) Substantial question of law No.1 does not arise for consideration in these appeals.

(ii) Substantial question of law Nos.2 and 4 are decided against the Revenue in view of the decision rendered by us in TCA.No.341 of 2019 dated 14.6.2019 and

(iii) Substantial question of law No.5 is

decided against the Revenue for the reasons set out above subject to the liberty granted by the CIT(A).

10. Hence, the appeals are admitted on substantial question of law No.3 namely

"Whether, on the facts and circumstances of the case and in law, the Tribunal was justified and correct in holding that the provisions of Section 115JB of the Act, which enables the companies to compute book profit may not be applicable to insurance companies?"

The Revenue is at liberty to re-frame this substantial question of law at the time of hearing the appeal since the respondent - assessee raised a dispute that they never claimed benefit under Section 115JB of the Act for the assessment year under consideration. List on 25.7.2019"

3. We have heard Mr.M.Swaminathan, learned Senior Standing Counsel for the appellant / revenue and Mr.M.V.Swaroop, learned counsel for the respondent / assessee.

4. It may not be necessary for us to dwell deep into the factual matrix, as we find that the error crept in the order passed by the Tribunal while deciding the issue with regard to 'addition of reserve for unexpired risk' while computing book profit under Section 115 JB of the Act. The Tribunal in Paragraph No.55 of the Impugned Order has noted that this issue arises for consideration in the Revenue's appeal for the assessment years 2003-2004, 2004-2005, 2007-2008 to 2013-2014 and in the assessee's appeals for the assessment years 2003-2004, 2007-2008 and 2012-2013.

5. It is not disputed by the learned counsel for the assessee that the issue does not arise for consideration for the assessment year 2013-2014. Both in the assessee's appeal as well as in the revenue's appeal, the issue arises only up to the year 2012-2013 and this is owing to the fact that there was an amendment to the Section 115 JB by substitution of Sub-Section 2 by Finance Act, 2012 with effect from 01.04.2013. The amended / Substituted Provision reads as follows:-

"(1) Notwithstanding anything contained in any other provision of the Act, where in the case of an assessee, being a company, the income-tax, payable on the total income as computed under this Act in respect of any previous year relevant to the assessment year commencing on or after the 1st day of April,

[Substituted for "2011" by the Finance Act, 2011, w.e.f.01.04.2012. Earlier, "2011" was substituted for "2010" by the Finance Act, 2010, w.e.f. 01.04.2011, "2010" was substituted for "2007" by the Finance (No.2) Act, 2009, w.e.f. 01.04.2010 and "2007" was substituted for "2001" by the Finance Act, 2006, w.e.f. 01.04.2007] [2012] is less than [Substituted for "eighteen per cent" by the Finance Act, w.e.f 01.04.2012. Earlier, "eighteen per cent" was substituted for "fifteen per cent" by the Finance Act, 2010, w.e.f. 01.04.2011, "fifteen per cent " was substituted for "ten per cent" by the Finance (No.2) Act, 2009, w.e.f. 01.04.2010 and "ten per cent" was substituted for "seven and one-half per cent" by the Finance Act, 2006, w.e.f. 01.04.2007] (eighteen and one-half per cent) of its book profit, [Substituted for "the tax payable for the relevant previous year shall be deemed to be seven and one-half per cent of such book profit" by Finance Act, 2002, w.r.e.f.01.04.2001 [such book profit shall be deemed to be the total income of the assessee and the tax payable by the assessee on such total income shall be the amount of income tax at the rate of [Substituted for "eighteen per cent" by the Finance Act, w.e.f 01.04.2012. Earlier, "eighteen per cent" was substituted for "fifteen per cent" by the Finance Act, 2010, w.e.f. 01.04.2011, "fifteen per cent " was substituted for "ten per cent" by the Finance (No.2) Act, 2009, w.e.f. 01.04.2010 and "ten per cent" was substituted for "seven and one-half per cent" by the Finance Act, 2006, w.e.f. 01.04.2007] [eighteen and one-half per cent]:

Inserted by the Taxation Laws (Amendment) Act, 2019, w.e.f.01.04.2020 [provided that for the previous year relevant to the assessment year commencing on or after the 1st day of April, 2020, the provisions of this sub-section shall have effect as if for the words "eighteen and one-half percent" occurring at both the places, the words "fifteen percent" had been substituted]

(2) Substituted for the portion beginning with the words "Every assessee", and ending with the words and figures "the Companies Act, 1956 (1 of 1956): "by the Finance Act, 2012, w.e.f. 01.04.2013. Prior to its substitution, the relevant portion read as under:

"(2) Every assessee, being a company, shall, for the purposes of this section, prepare its profit and loss account for the relevant previous year in accordance with the provisions of Parts II and III of Schedule VI to the Companies Act, 1956 (1 of 1956):"

(a) being a company, other than a company referred to in clause (b), shall for the purposes of this section, prepare its substituted for "Profit and Loss account" by the Finance Act, 2017, w.e.f. 01.04.2017 [statement of profit and loss] for the relevant previous year in accordance with the provisions of (Substituted for "Part II of Schedule VI", ibid) [Schedule III] to the (Substituted for "Companies Act, 1956 (1 of 1956)", ibid [Companies Act, 2013 (18 of 2013)]]; or

(b)being a company, to which the Substituted for "Proviso to sub-section(2) of Section 211", ibid [second proviso to sub-section (1) of Section 129) of the Substituted for "Companies Act, 1956 (1 of 1956)" ibid [Companies Act, 2013 (18 of 2013) is applicable, shall, for the purposes of this section, prepare its Substituted for "profit and loss account" by the Finance Act, 2017 w.e.f. 01.04.2017 [statement of profit and loss] for the relevant previous year in accordance with the provisions of the Act governing such company :]"

6. In the light of the above, as per the amendment culled above in the Act, the issue has to be decided by the Tribunal, however, due to inadvertence, the Tribunal has observed in Paragraph No.56 of the Order that Section 115JB is not applicable to the insurance companies and therefore, held that there is no infirmity in the order passed by the CIT (Appeals).

7. Since the provision has been made applicable to the Insurance companies as well with effect from 01.04.2003, the Tribunal has to decide the issue on merits for the assessment year 2013-2014 and decide as to whether the assessing officer was right in computing dis-allowance reserved for unexpired risk provision towards IBNR / IBNER claim and dis-allowance under Section 14(A) read with Rule 18 and the Tribunal to take a decision on merits and in accordance with law, therefore, the matter has to be remanded to the Tribunal for fresh consideration, accordingly, the observations made by the Tribunal in the impugned order in Paragraph Nos.55 and 56 are set aside, insofar as it relates to assessment year 2013-2014 and the matter is remanded to the Tribunal to decide the issue with regard to the computation under book profit and whether the assessing officer was right in his computation.

In the result, the appeals are partly allowed to the extent indicated above and the matter stands remanded to the Tribunal, consequently, the Substantial Question of Law No.3 is left open. No costs.

Sd/-

Assistant Registrar(CS VI)

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Sub Assistant Registrar

To

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

2.The Commissioner of Income Tax,
Chennai.

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

4.The Assistant Commissioner of Income Tax,
Corporate Circle 3(2),
Chennai.

+1cc to Mr.M.V.Swaroop, Advocate, S.R.No.39519

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VD(CO)
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