

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 15.09.2020

CORAM:

THE HON'BLE MR.JUSTICE N.KIRUBAKARAN
and
THE HON'BLE MR.JUSTICE P.VELMURUGAN

T.C.A.No.181 of 2018
and C.M.P.No.2396 of 2018

Ponmani Suresh ..Appellant/Appellant

-Vs-

The Deputy Commissioner of Income Tax
Non-Corporate Ward 2
Chennai ..Respondent /Respondent

Prayer:Tax Case Appeal filed under Section 260-A of the Income Tax Act, 1961, against the order dated 21.09.2017 made in ITA.No.1011/Mds/2017 on the file of the Income Tax Appellate Tribunal, Chennai 'D' Bench relating to the Assessment Year 2012-13 against the order of the Commissioner of Income Tax (Appeals)2 Chennai dated 31.03.2017 and made in I.T.A. No.4/CIT (A)-2/2015-2016 as against the order passed by the Deputy Commissioner of Income Tax Non Corporate Circle-2 Chennai in PAN/GIR No. AALPP7516R dated 30.03.2015 for the Assessment year 2012-2013.

For Appellant : Mr.K.Ravi
For Respondent : Ms.R.Hemalatha, Standing counsel

JUDGMENT

P.VELMURUGAN, J.

The Tax Case Appeal is filed by the appellant/assessee as against the order of the Income Tax Appellate Tribunal, Chennai Bench 'D' dated 21.09.2017 passed in ITA.No.1011/Mds/2017 relating to the Assessment Year 2012-13.

2.1 The facts of this case is that the assessee declared a total income of Rs.3,08,330/- in the original return of income filed on 30.05.2012 for the assessment year 2012-13. Subsequently, as a result of enquiry conducted by I & CI Unit of the Income Tax Department, Chennai, the assessee had filed a revised return of income on 31.03.2014 with a total income of Rs.19,14,060/-. The case was selected for scrutiny and notice

under Section 143(2) of the Income Tax Act, 1961 [hereinafter called as 'Act'] dated 04.09.2014 was served on the assessee. Subsequently, notice under section 142(1) dated 12.12.2014 seeking details and documents, was also served on the assessee. After careful examination of the case, the assessment order was passed computing the taxable income assessed as Rs.7,29,75,896/-.

2.2 Under the head Capital Gains, the appellant/assessee had admitted income from Long term capital gains of Rs.96,465/- from the sale of her property being Flat No.14, G.N.Chetty Road, T.Nagar, Chennai-17, jointly held with her husband. Since no evidence had been adduced in respect of cost of renovation of Rs.6,18,500/-, it was disallowed. The indexed cost of acquisition was reworked at Rs.31,62,950/- as against Rs.37,03,535/- and consequently, the long term capital gains had been assessed as Rs.5,37,050/- as against Rs.96,465/-. Thus, the additional long term capital gains assessed was Rs.4,40,585/-.

2.3 Secondly, under the head of Profit on facilitating sale of property at Velacherry, since there was no supporting evidence in respect of the claim of payment/expenditure of Rs.6,64,95,000/- adduced by the assessee, notice u/s.142(1) of the Act, dated 17.03.2015 was issued to the following effect:-

" 1. ' In respect of your transaction in connection with sale of property at Velachery owned by Mr.Stephen John, out of the sum of Rs.6.8 crores received from M/s.ITC Ltd., you have claimed that a sum of Rs.4.5 crores has been given to Mr.Stephen John (Vendor). However, from the details of cheques issued, it is seen that the same has been issued in the names of various other parties. In this background, you are requested to furnish documentary evidence in support of your claim that Rs.4.5 crores was given to Mr.Stephen John, by producing confirmation to this effect from the parties to whom the above cheques have been issued. Also produce copy of your agreement with Mr.Stephen John in connection with this transaction.

2. Further, a sum of Rs.2,14,95,000/- has been claimed as payments made to various persons involved in vacating tenants for putting the property for sale. The said payments have been made by way of cheques issued. Furnish copies of receipts obtained at the time of issue of cheques detailing the purpose behind the payment or confirmation from such parties.

2.4 The assessee, by reply dated 20.03.2015, stated that she did not have any records in the said transaction and therefore, requested the department to exercise powers under

section 131 to summon Mr.Stephen John, residing at No.11/724, Pipeline Road, Cochin University Post, Cochin, to get further details of the transaction.

2.5 The department made enquiries with Stephen John and the DDIT (Inv.) Kochi, had recorded a statement from Stephen John on 26.03.2015. It is stated that he was paid a cheque for Rs.8 crores in the sale transaction and he has not received a single rupee from either Ponmani Suresh or other persons.

2.6 Therefore, the Assessing Officer, viewed that the claim of the assessee that she is a mere real estate intermediary lacks truth and is proven that she is a major beneficiary in the transaction. The Assessing Officer further viewed that the case under consideration is not an isolated issue and while undertaking assessment proceedings of assessee's spouse, K.Suresh, large scale unexplained cash deposits into bank accounts held by him were found and the baseless explanation given to support the source of cash availability was not found acceptable. In the absence of confirmation from debtors/parties from whom the assessee has claimed to have received real estate advance in cash, the assessee's claim for availability of such cash was not accepted and consequently, the entire cash deposits made into the assessee's bank account were treated as unexplained. Thus, a sum of Rs.95,00,000/- was added to the total income under section 68 of the Act. The computation of taxable income redrawn by the Assessing Officer was Rs.7,29,75,896/- and the said demand was directed to be paid as per the Demand Notice.

3. Aggrieved by the said order of the Assessing Officer/Deputy Commissioner of Income Tax, Non Corporate Circle-2, Chennai, the appellant/assessee filed appeal before the Commissioner of Income Tax (Appeals)-1.

4. The CIT (Appeals)-1, on analysis of facts and circumstances of the case, held that the appellant did not avail the opportunity of cross examination of Stephen John and did not emphasize the need to undertake a similar process to examine the so called debtors. Therefore, at the stage of remand proceedings, no evidence was submitted to substantiate the genuineness of the claim. It is further pointed out by the CIT (Appeals)-1 that the cash obtained by the Appellant through self drawn cheques and covered under the provisions of Section 40A(3) cannot be telescoped with that of the cash deposit since the withdrawal date succeeds the deposit date. Accordingly, the appeal of the assessee was dismissed.

5. Aggrieved by the said order of CIT (Appeals)-1, dated 31.03.2017, the assessee filed appeal before the Income Tax Appellate Tribunal.

6. The ITAT found that the Assessing Officer, on examination of the accounts and the veracity of the claims did not accept the nexus between the payments and the receipts and therefore, the entire expenditure relating to six parties of Rs.4,50,00,000/- and in respect of the balance, an amount of Rs.1,61,21,250/- was found to be ineligible as deduction and added the same to the taxable income. The ITAT found that the assessee is not the owner of the asset transferred to ITC Ltd., but had received a consideration of Rs.6.80 crores. The obvious reason is that the assessee was compensated in lieu of facilitating an unencumbered conveyance of property to the buyer.

7. The ITAT dismissed the ground of the assessee that the return filed by the assessee on 31.03.2014 cannot be treated as return of income filed as per Section 139(5) of the Act, since the return is not filed on account of discovery of omission by the assessee but as a result of enquiry, by holding that assessee actively participated during the course of assessment proceedings and therefore, the said ground cannot be entertained before the Tribunal.

8. The other ground taken by the appellant/assessee was that an opportunity of cross examination of Stephen John was not provided to the assessee by the CIT (Appeals).

9. The ITAT, was of the opinion that when the assessee asks for cross examination of the parties from whom evidences are collected, it is appropriate to provide an opportunity for cross examination. Though the statement of Stephen John was recorded in the presence of assessee's spouse, an opportunity of cross examination was not at all given to the assessee. If the CIT (Appeals)/Assessing Officer collects the evidences from the parties during the remand proceedings, the CIT(Appeals)/AO should have given an opportunity of cross examination to the assessee. In such view of the matter, the ITAT remitted the entire issue to the CIT (Appeals) with a direction to give an opportunity of cross examination before deciding the issue.

10. The ITAT thus remitted the entire issue to the file of the CIT (Appeals) and directed the CIT (Appeals) to give an opportunity of cross examination to the assessee before deciding the issue.

11. Aggrieved by the said order of ITAT, the present Tax Case Appeal is filed by the appellant/assessee raising the following substantial questions of law:-

(1) Whether the return filed on 31/03/2014 for the Assessment Year 2012-13 is a non-est return and not a return u/s.139(5) of the Income Tax Act, 1961? Consequently, whether the assessment framed u/s.143(3) based on a non-est return filed is valid in the eyes of law?

(2) If the assessment based on a non-est return is invalid, whether such an invalidity can be cured by the provision of Section 292BB of the Income Tax Act, 1961 which deals only with service of notice and further for the reason that the appellant was heard during the assessment proceedings?

(3) Whether the assessment order dated 30.03.2015 passed without giving an opportunity of cross examination in respect of evidence gathered behind the back of the appellant during the assessment proceedings is void and a nullity?

(4) Whether an assessment order, which was passed without giving an opportunity of cross examination in respect of evidence gathered behind the back of the appellant during the assessment proceedings, can be validated by giving an opportunity of cross examination in the appellate proceedings?

12. Heard the learned counsel on either side and perused the materials available on record.

13. Before the Income Tax Appellate Tribunal, the learned counsel who appeared on behalf of the assessee, contended that an opportunity of cross examination of Shri.Stephen John was not provided to the assessee by the CIT (Appeals) that too even after raising the said issue before the CIT(Appeals). The learned counsel further contended before the ITAT that while examining Stephen John, the statement was recorded by the Assessing Officer in the presence of the assessee's spouse, viz., Kalyanasundaram Suresh, but no opportunity of cross examination of Stephen John was provided to the assessee. The learned counsel for the assessee thus contended before the ITAT that an opportunity may be given to the assessee to cross examine Stephen John, before framing the assessment.

14. The Income tax Appellate Tribunal, after going through the entire submissions made on both sides, held as under:-

"In the present case, though the statement from Stephen John was recorded in the presence of the assessee's spouse, an opportunity of cross examination was not at all given to the assessee. If the CIT

(Appeals)/AO collects the evidences from the parties during the remand proceedings, the CIT (Appeals)/Assessing Officer should have given an opportunity of cross examination to the assessee. Hence, in the interest of justice, we are of the opinion that the entire issues to be remitted to the CIT (Appeals) with a direction to give an opportunity of cross examination before deciding the issue."

15. Since the appellant/assessee has raised the issue of opportunity of cross examination of Stephen John and the same was given to the assessee and for the same, the matter is remitted back to the CIT (Appeals), we are of the view that there is no infirmity in the order of the Income Tax Appellate Tribunal and thus, we find no merit in the Tax Case appeal and the Appeal is liable to be dismissed.

16. Since the Income Tax Appellate Tribunal has remitted back the matter to the CIT (Appeals) giving opportunity to the assessee for cross examination, and further directed the CIT (Appeals) to decide the matter, after giving opportunity of cross examination to the assessee, the substantial questions of law 1 and 2 are concerned, they are left open to the CIT (Appeals) to decide the same on merits and in accordance with law. As far as Substantial questions of law 3 and 4 are concerned, in view of the matter remitted back to the CIT (Appeals) by the Income Tax Appellate Tribunal and the said order is confirmed now, the same has been answered accordingly.

17. In the result, the Tax Case (Appeal) stands dismissed. The order of the Income Tax Appellate Tribunal in remitting back the matter to the CIT (Appeals) is confirmed. No costs.

s/d-

Assistant Registrar(CS V)

True Copy

Sub-Assistant Registrar

To

1.The Commissioner of Income Tax (Appeals)-2

121 Mahathma Gandhi Road

Nungambakkam, Chennai 600 034.

2.The Deputy Commissioner of Income Tax
Non-Corporate Ward 2
Chennai

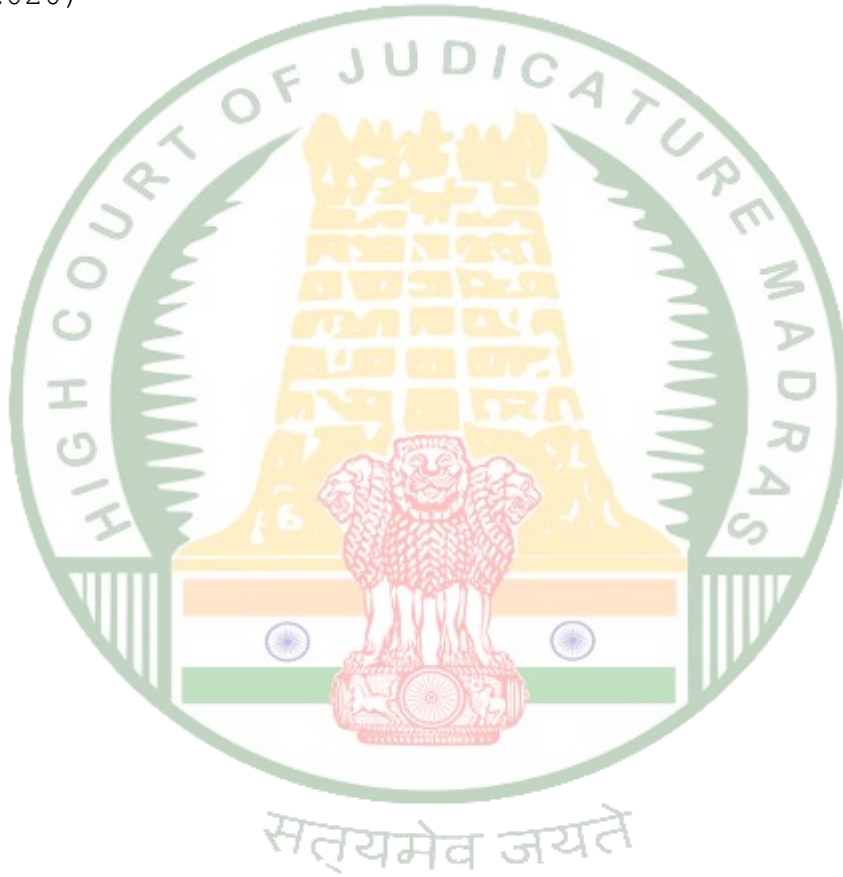
3.The Income Tax Appellate Tribunal
Chennai 'D' Bench

+1 CC to Mr.T. Ravikumar, Advocate sr 29962.

+1 Cc to Mr.K.Ravi, Advocate sr 30134.

T.C.A.No.181 of 2018

MP(CO)
SP(21/10/2020)



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