IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 29.07.2020

CORAM:

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

Tax Case Appeal No.316 of 2018

Shri Ravi Kannan
L&T Eden Park,
OA4 0801,
MR Radha Nagar, Siruseri,
Chennai - 603 103. .. Appellant

versus

The Assistant Commissioner of Income Tax,
Business Circle - IV,
Chennai. .. Respondent

Tax Case Appeal filed under Section 260A of the Income Tax Act, 1961, against the order made in ITA No.112/Mds/2016 dated 17.02.2017 passed by the Income Tax Appellate Tribunal, 'B' Bench, Chennai, for the Assessment Year 2011-12.

Appeal against the Order made in C.No. 6119(14)/ PRCIT-6/2014-15, dated 27/11/2015 passed by the Principal Commissioner of Income Tax, Chennai - 6, for the Assessment Year 2011-12, against the order passed by the Assistant Commissioner of Income Tax, Business Circle IV, Chennai, dated 08/11/2013 for the Assessment year 2011-12.

For Appellant : Mr.R.Sivaraman

For Respondent : Mr.J.Narayanaswamy
Senior Standing Counsel

JUDGMENT

T.S.SIVAGNANAM, J.

This appeal by the assessee filed under Section 260A of the Income Tax Act, 1961 (the 'Act' for brevity), is directed against the order dated 17.12.2017 in ITA No.112/Mds/2016 on the file of the Income Tax Appellate Tribunal, Chennai, 'B' Bench, for the Assessment Year 2011-12.

2. The Tax Case Appeal was admitted on 17.12.2018 on the following Substantial Questions of Law.

"(i) Whether on the facts and

circumstances of the case, the Appellate Tribunal was right in law in confirming the action of the CIT u/s 263 holding that the order passed by the AO dated 08.11.2013 is erroneous and prejudicial to the interest of the revenue?

(ii) Whether on the facts and circumstances of the case, the Appellate Tribunal was right in law and having regard to sub-section 4 of section 54F, whether the assessee is entitled to claim exemption u/s 54F for the present Assessment Year namely 2011-12 having deposited the entire Capital gains in the Capital Gains scheme account?"

3. We have heard Mr.R.Sivaraman, learned counsel for the appellant/assessee and Mr.J.Narayanaswamy, learned Senior standing counsel appearing for the respondent / revenue.

4. To answer the substantial questions of law, which have been framed, we have to decide as to whether the Principal Commissioner of Income Tax-VI, Chennai [the 'PCIT', for brevity], was well within his jurisdiction to invoke his power under Section 260A of the Act and whether the ingredients required to be satisfied to invoke such power was available in the assessee's case.

5. The assessee is an individual, deriving income from investment in Shares and Mutual Funds. For the Assessment Year under consideration viz., 2011-12, the assessee filed return of income of Rs.6,00,47,572. The return was processed and an intimation under Section 143(1) of the Act was issued. The case was selected for scrutiny for examining the sale consideration and cost claimed while computing the Long Term Capital Gains (LTCG) before deduction, the assessee was called upon to produce the necessary documents and the Assessing Officer after verification completed the assessment under Section 143(3) by order dated 08.11.2013. The PCIT issued Show cause notice under Section 263 on 27.11.2015 proposing to revise the assessment. The assessee submitted their objections for assumption of jurisdiction under Section 263 of the Act as well as on the factual matrix. The PCIT by order dated 27.11.2015 held that the assessment order was erroneous, accordingly, set aside the same and remanded the matter to the Assessing Officer to examine whether the assessee was eligible for the claim under Section 54F of the Act. Aggrieved by such order, assessee preferred appeal before the tribunal which confirmed the order passed by the PCIT. Challenging the order of PCIT, the assessee is before this Court by way of the above appeal, admitted to decide the above mentioned substantial

questions of law.

6. The law on the subject is no longer a res integra and the oft quoted decision is in the case of Malabar Industrial Company Limited Vs. CIT, reported in (2000) 109 Taxmann 66 (SC). The Hon'ble Supreme Court held that a bare reading of Section 263(1) makes it clear that the prerequisite to exercise of jurisdiction by the Commissioner suo motu under it, is that the order of the Income Tax Officer is erroneous, in so far as it is prejudicial to the interest of the revenue. The Commissioner has to be satisfied of twin conditions viz., (i) the order of the Assessing Officer sought to be revised is erroneous; and (ii) it is prejudicial to the interest of the revenue, if one of the two conditions is absent viz., if the order of the Assessing Officer is erroneous, but is not prejudicial to the revenue or if it is not erroneous, but is prejudicial to the revenue, recourse cannot be had to Section 263(1) of the Act.

7. Bearing this legal principal in mind, we proceed to examine as to in what manner the PCIT proposed to invoke his power under Section 263 of the Act. Section 263(1) of the Act mandates that the assessee be given an opportunity of being heard and therefore, the assessee is required to be show caused as to why the PCIT considers that the order passed by the Assessing Officer is erroneous in so far it is prejudicial to the interest of the revenue. Thus, the show cause notice should disclose as to the prima facie opinion formed by the PCIT.

8. In the assessee's case, show cause notice was issued on 27.10.2015. The first three paragraphs of the show cause notice may not be very relevant because it deals with the return of income filed by the assessee, the order of assessment under Section 143 (3) of the Act and the facts pertaining to the deduction claimed by the assessee under Section 54F of the Act and a part of Section 54F (1) has been extracted. After noting the above, the PCIT states as follows:

> "On the examination of records, it is ascertained that proper verification was not done while allowing the claim of deduction under Section 54F of the Income Tax Act, 1961".

9. In the fifth paragraph, the PCIT states that

> "....it is noticed that the sale process was not in accordance with the SEBI guidelines in force then and copies of agreement entered upon were also not disclosed".

10. With the above two "reasons", the PCIT states that he is of the prima facie view that the assessment order is erroneous and prejudicial to the interest of the revenue. The extracted portion of the show cause notice clearly shows that

it is a vague statement. The PCIT agrees that verification was done by the Assessing Officer, however states that proper verification was not done. If such is the prima facie opinion of the PCIT, he was bound to disclose in the show cause notice as to why he considers the verification to be not proper. The issuance of show cause notice is not an empty formality. It is for the purpose of assessee to respond to the prima facie opinion formed by the revising authority. Therefore, if the show cause notice is vague, then the purpose for issuance of show cause notice is defeated and consequently, all proceedings subsequent thereof may be required to be declared as a nullity. The defect is uncureable qua the power under Section 263 of the Act.

11. The second reason stated by the PCIT is that the sale process was not in accordance with the SEBI guidelines and copies of agreement entered upon were not disclosed. It is not sufficient for the PCIT to state that it is not in accordance with SEBI guidelines, as the statute mandates that he should disclose his mind as to why he considers this to be prejudicial to the interest of the revenue. Without such an averment, the show cause notice has to be held to be vague for the second time. This would be sufficient for us to quash the entire proceedings and set aside the order passed by the tribunal and answer the Substantial Questions of Law in favour of the assessee. However, since elaborate submissions were made by Mr.R.Sivaraman, learned counsel for the assessee and Mr.J.Narayanasamy, learned Senior Standing Counsel, we had examined the manner in which PCIT has proceeded to take a decision in the matter.

12. What has weighed in the minds of PCIT is that the assessment order being a very brief order, he would say that the assessing officer did not apply his mind. In our considered opinion that cannot be a right test in all cases. The order may be brief, yet, if it conveys what it needs to, it would meet the ends of justice. An order can be very elaborate, yet, can be devoid of reasons and erroneous. Therefore, the length of the order or the bulk of the papers, is not the correct test. The PCIT blames the assessing officer for not having properly verified the records. This in our view is an incorrect statement, because, the assessment was completed pursuant to a notice under Section 142(1). Copy of the notice dated 26.06.2013 has been furnished in the additional paper book, from which we see that as many as 16 queries have been asked and the assessee was called upon to explain the same and all pertains to the subject issue viz., the claim of deduction under Section 54F. The bulk of papers which were placed before the Assessing Officer will evidently show that the Assessing Officer did apply his mind and it is not a case where the Assessing Officer did not take note of any of the records. In fact the Assessing Officer has recorded that notice was issued to the assessee under Section 142(1) and his authorised representative appeared before him

on various dates and filed the details called for and he was required to produce the investment details, bank account details and the proof regarding sales of shares i.e share certificate, which the assessing officer records that the authorised representative of the assessee produced before him and he verified the same.

13. Further, the Assessing Officer states that the authorised representative also clarified that the Assessee has started the construction of a residential house in the land purchased and will be completed before the year end. Thus, the Assessing Officer records that after a thorough verification of all records, the same has been found to be correct and the assessment completed by accepting the return filed by the assessee. We find that nothing more is required to be recorded by the assessing officer, especially when the assessment file would contain all the material which has been produced by the assessee. In fact the bank details have been produced to show that the amount has been invested in Capital Gain Scheme Account in two banks viz., Bank of Maharashtra and UCO Bank and the banks have given letters dated 31.12.2015 to the said effect. Thus, we are of the view that there was no material to indicate that the assessment was an erroneous assessment in so far as it is prejudicial to the interest of the revenue.

14. Before the tribunal, in the appeal filed by the assessee, the tribunal largely proceeded on the power of the PCIT under Section 263 of the Act, noted the decision in the Malabar Industries Company Limited [cited supra], stated that arbitrariness in decision-making would always need a correction regardless of whether it causes prejudice to the assessee or to the State exchequer, referred to the decision of the Hon'ble Supreme Court in S.N.Mukherjee vs. Union of India, reported in AIR 1990 SC 1984, for the preposition that reasons must be recorded by administrative authorities and finally, rejects the assessee's appeal.

15. The tribunal fell in error in not testing at the very first instance, as to whether the show cause notice issued by PICT was justifiable for assumption of jurisdiction under Section 263 of the Act. Thus, without addressing the moot point, the tribunal proceeded on a different footing. In fact, before the tribunal, the assessee raised a point about non applicability of SEBI guidelines, because the transaction was between an individual and the company. We find that there has been no adjudication on the said issue.

16. Further, the assessee had also specifically contended that it was necessary to comply with Section 54F (iv) and if the assessee invests the entire consideration in capital gains scheme account as contemplated within the period, then, such investment shall be deemed to be only cost of new asset and exemption under Section 54F is automatic. The assessee

further contended that shares were sold for Rs.15 Crores on 18.01.2011 and before the due date for filing the return, the assessee had deposited into Capital Gains Scheme Account, the LTCG and therefore, contended that as per Section 54F(iv), the assessee had duly complied with the condition for availing exemption. These issues were not adjudicated by the tribunal. Thus, we hold that the assumption of jurisdiction by the PCIT is erroneous and the order passed by the tribunal confirming such an order, calls for interference.

17. In the result, the Tax Case Appeal is allowed and the Substantial Questions of Law, are answered in favour of the Assessee. No Costs.

Sd/-

Assistant Registrar (CS-III)

//True Copy//

Sub Assistant Registrar

ars/ssd

To

1. The Assistant Commissioner of Income Tax,
   Business Circle - IV,
   Chennai.

2. The Income Tax Appellate Tribunal,
   'B' Bench, Chennai.

3. The Principal Commissioner of Income Tax,
   Chennai-6.

4. The Assistant Commissioner of Income Tax,
   Business Circle IV, Chennai.

TCA No.316 of 2018

SSI(CO)
GN(08/10/2020)