

In the High Court of Judicature at Madras

Dated : 02.09.2020

Orders reserved on 26.08.2020	Orders pronounced on 02.09.2020
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Coram :

The Honourable Mr.Justice T.S.SIVAGNANAM
and
The Honourable Mrs.Justice PUSHPA SATHYANARAYANA

Tax Case Appeal No.439 of 2018

The Commissioner of Income Tax,
Chennai.

...Appellant

Vs

M/s.City Lubricants Pvt. Ltd.,
No.14, Thiruneermalai Road,
Chrompet,
Chennai - 600 044.
PAN: AABCC3825H

...Respondent

APPEAL under Section 260A of the Income Tax Act, 1961 against the order dated 20.12.2017 in ITA No.3250/Mds/2016 on the file of the Income Tax Appellate Tribunal Chennai 'C' Bench for the assessment year 2007-08, and against the Appellate order dated 01.09.2016 made in ITA 203/CIT (A)-1/2015 -16, passed by the commissioner of Income Tax(Appeals)-1 Chennai, for the Assessment year 2007-2008 and the against the Assessment order dated 25/03/2015 made in PAN/GIR No.AABCC38254 Passed by the Deputy Commissioner of Income Tax, corporate Circle 1(2) Chennai, for the Assessment year 2007-2008.

For Appellant : Mr.T.Ravikumar
Senior Standing Counsel

For Respondent : Mr.S.Sridhar
Assisted by M/s.Harshini Jothiraman

JUDGMENT

Judgment was delivered by 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 20.12.2017 in ITA No.3250/Mds/2016 on

the file of the Income Tax Appellate Tribunal Chennai 'C' Bench for the assessment year 2007-08.

2.The appeal was admitted by the Hon'ble First Bench by order dated 17.07.2018 on the following substantial question of law:

“Whether the learned Tribunal substantially erred in law in holding that Rs.9 Crores received by the assessee pursuant to a Development Agreement had not accrued as income and was, therefore, not taxable till the Joint Development Agreement took off and sale proceeds were received by the developer?”

3.The assessee filed their return of income for the assessment year under consideration, AY 2007-08 on 24.09.2008 admitting a loss of Rs.4,11,076/-. The return was processed under Section 143(1) on 26.03.2009. The assessee's case was selected for scrutiny under Section 147 of the Act, notice under Section 148 dated 19.04.2013 was issued and the reason for reopening was that during the assessment proceedings for AY 2010-11, it was found that the assessee entered into a development agreement with L&T Urban Infrastructure Ltd. for development of its land of 35 acres 44 cents in Kanchipuram District and the development agreement was entered into on 09.03.2007. As per the various clauses of the development agreement, the developer was granted irrevocable licence to develop the land, vacant possession of the property was handed over to the developer and a power of attorney dated 16.03.2007 was also executed in favour of the developer by the assessee Company. Since physical possession of the property was given and an amount of Rs.9 Crores was received by the assessee from the developer towards advance during the financial year 2006-07, capital gains is eligible on the transfer of property under consideration as per provisions of Section 2(47) r/w. Section 45 of the Act. It was stated that for AY 2007-08, the assessee in its return of income had not admitted capital gains and consequently, no assessment was made for the said year. The assessee resisted reopening contending that there was no transfer of the land and the transaction cannot be treated to be a deemed transfer under Section 2(47)(v) of the Act. The Assessing Officer after considering the stand taken by the assessee held that since the original development agreement and power of attorney were cancelled, it cannot be treated as transfer under Section 2(47) of the Act. However, with regard to the amount of Rs.9 Crores received by the assessee as advance, the Assessing Officer came to the conclusion that the same has to be treated as a windfall gain and treated as income from other sources and accordingly completed the assessment by order dated 25.03.2015. Aggrieved by such order, the assessee

preferred appeal before the Commissioner of Income Tax-I [CIT (A)], Chennai. The appeal was allowed by order dated 01.09.2016. Aggrieved by the same, the revenue preferred appeal before the Tribunal which was dismissed by the impugned order.

4.Mr.T.Ravikumar, learned Senior Standing Counsel appearing for the appellant/revenue after setting out the factual position and referring to the various clauses in the Memorandum of Understanding [MOU] dated 16.11.2016 submitted that the Assessing Officer was right in treating the sum of Rs.9 Crores as income in the hands of the assessee and this fact came to light during the scrutiny of the returns for the year 2010-2011. It is submitted that the assessee received the sum of Rs.9 Crores during the financial year 2006-07 relevant to AY 2007-08 and the amount remained with the assessee till 2015. Further, the MOU was cancelled only in February 2015 and therefore, the Assessing Officer was right in treating the said amount as a windfall gain. It is submitted that the CIT(A) while examining the said aspect did not give sufficient reasons as to why the order of assessment required interference. Before the Tribunal, it was submitted that the CIT(A) failed to appreciate that the Assessing Officer was right in treating the sum received from the developer as a windfall gain as no clear cut finding existed whether the liability still existed. Further, the CIT(A) erred in not giving a finding whether the income derived from the sum of Rs.9 Crores received by the assessee has been offered to tax. Though such contentions were put forth before the Tribunal, the Tribunal without assigning proper reasons erroneously dismissed the appeal filed by the revenue. The learned senior standing counsel also referred to the balance sheet as on 31.03.2008 and the annexures to the same. In support of his contentions, Mr.T.Ravikumar, learned senior standing counsel referred to the decisions in the case of Commissioner of Income Tax vs. T.V.Sundaram Iyengar & Sons Ltd. [(1996) 222 ITR 344(SC)], Commissioner of Income Tax vs. Balbir Singh Maini [(2017) 398ITR 0531(SC)], Seshasayee Steels (P) Ltd. vs. Assistant Commissioner of Income Tax [(2020) 115 taxmann.com 5(SC)] and Commissioner of Income Tax -8 vs. Lok Housing Constructions Ltd. [(2016) 70 taxmann.com 2(SC)].

5.Per contra, Mr.S.Sridhar, learned assisted by M/s.Harshini Jothiraman, learned counsel appearing for the respondent/assessee contended that the CIT(A) reversed the order passed by the Assessing Officer after considering the full facts and the Tribunal re-appreciated the factual position and concurred with a view taken by the CIT(A) and as such, no substantial question of law arises for consideration in this appeal. Further, it is submitted that the amount of Rs.9 Crores will not fall within the definition of 'income' as defined under Section 2(24) of the Act. Further the reopening of the

assessment was by invoking Section 2(47)(v) of the Act and the issue pertaining to the advance of Rs.9 Crores received by the assessee was never a reason for reopening and therefore, the order of the Assessing Officer is erroneous. It is submitted that none of the decision relied on by the learned standing counsel for the revenue would apply to the facts and circumstances of the case. In the case of T.V.Sundaram Iyengar & Sons Ltd., the assessee themselves treated the money as their own money, whereas the assessee in the case on hand treated it as a liability. It is further submitted that the Assessing Officer committed a factual error in observing that the development agreement and the power of attorney were cancelled whereas the same continued to remain in force. It is further submitted that the interest of the revenue has been sufficiently protected as the advance amount is to be reduced from the cost of acquisition and in terms of Section 51, the assessee will be paying more tax.

6. Heard the learned counsels on either side and perused the materials available on record.

7. The assessment for the relevant year, AY 2007-08 was reopened based on certain information which the Assessing Officer noticed during the assessment proceedings for AY 2010-11. The reasons for reopening were furnished to the assessee, a reading of which shows that the Assessing Officer proposed to apply Section 2(47) of the Act and observed that the assessee has not admitted the income in their return and not offered for capital gain tax. Thus, the issue pertaining to the amount of advance received by the assessee, namely, Rs.9 Crores was never the subject matter of the reopening proceedings which is sufficient to hold that the assessment order dated 25.03.2015 to be a nullity. Nevertheless, we heard the learned counsels on either side very elaborately. The question would be whether the amount of Rs.9 Crores can be stated to be a windfall gain and treated as income from other sources. Before doing so, we may point out that the objections given by the assessee for the reopening of the assessment proposing to invoke Section 2(47) of the Act was accepted by the Assessing Officer and it was held that the transaction cannot be treated as a transfer under Section 2(47) of the Act. However, the Assessing Officer brought to tax the amount of Rs.9 Crores under the head 'income from other sources' by treating it as a windfall gain. To explain what is a windfall gain, the learned counsel for the respondent referred to P.Ramanatha Aiyar's Advanced Law Lexicon, 3rd Edition, 2005, whereunder, 'Windfall' has been explained to be an unanticipated benefit, usually in the form of a profit and not caused by the recipient. 'Windfall gains and losses' has been explained to be gain or loss resulting from circumstances outside the control; of the recipient. Having noted the meaning

of a windfall gain it has to be seen as to whether the said amount of Rs.9 Crores was a windfall gain for the assessee. After carefully perusing the terms and conditions of the MOU dated 16.11.2016, the Joint Development Agreement dated 09.03.2007, the Escrow Agreement dated 14.03.2007, the Power of Attorney dated 16.03.2007, it is evidently clear that the amount of Rs.9 Crores was paid as advance under the MOU. The said amount was to be adjusted/appropriated against the revenue share of the assessee. The modus/manner of adjustment/appropriation was agreed to be done based on mutual agreement. This amount remained with the assessee, the assessee in turn created a mortgage in favour of the developer to the tune of about Rs.120 Crores and possession of the land was handed over for the purpose of development. The Joint Development Agreement did not take off and the matter remained as such and ultimately, in February 2015, the developer addressed the assessee to return the amount of Rs.9 Crores before 31.03.2015. Even at that point of time, the agreement was not cancelled and the power of attorney granted to the developer remained in force. Therefore, by no stretch of imagination, the sum of Rs.9 Crores in the hands of the assessee can be treated to be a windfall gain as it did not accrue to the assessee as a result of circumstances outside their control. Therefore, the finding of the Assessing Officer is incorrect. The Assessing Officer appears to have been guided by the fact that the amount of Rs.9 Crores remained with the assessee from the financial year 2006-07 till 2015-16 and therefore, it should be treated as an income in the hands of the assessee and brought to tax because the amount was returned to the developer only in March 2015.

8.Firstly, we need to consider as to whether the said amount of Rs.9 Crores can be treated as income from other sources. Section 56(1) of the Act states that income of every kind which is not to be executed from the total income under the Act shall be chargeable to income tax under the head "income from other sources", if it is not chargeable under any of the heads specified in Section 14, Items A to E. Section 14 deals with heads of income, wherein the following classification has been made, namely, A-Salaries, B-Omitted, C-Income from house property, D-Profits and gains of business or profession, E-Capital gains. There is no finding rendered by the Assessing Officer that the sum of Rs.9 Crores does not fall under the heads A to E to be brought under head 'F' which deals with 'Income from other sources'. Therefore, the finding of the Assessing Officer is perverse. Further, we find that what weighed in the mind of the Assessing Officer to hold that the amount of Rs.9 Crores lies in the hands of the assessee was a windfall gain is by referring to an event which took place during the assessment year 2015-16. Obviously, this could not have been done by the Assessing Officer because the assessment

which was the subject matter of consideration was of the year 2007-08. The Joint Development Agreement , Power of Attorney, the mortgage were all in force at the relevant time. In fact, even on the date when the Assessing Officer completed the assessment under Section 147 of the Act by order dated 25.03.2015, the Joint Development Agreement was not rescinded and the Power of Attorney was not cancelled. Therefore, on facts, the Assessing Officer could not have held that this is on account of a windfall gain to be brought to tax under the head 'income from other sources'.

9.The decision in the case of T.V.Sundaram Iyengar & Sons Ltd. would not apply to the facts and circumstances of the case on hand as in the said decision, the assessee itself treated the money as its own money and taken the amount to its profit and loss account, whereas in the instant case, the assessee continued to show the same as a liability. The decision in the case of Balbir Singh Maini also would not be of relevance because the Assessing Officer himself held that Section 2(47)(v) of the Act could not be applied. The decision in the case of Seshasayee Steels (P) Ltd., is also distinguishable on facts as it pertains to the question whether the transaction would fall under Section 2(47) of the Act which does not arise in the case on hand, equally the decision in the case of Lok Housing Construction Ltd.

10.Thus, for all the above reasons, we hold that the order passed by the Tribunal does not call for any interference and consequently, the Substantial Question of law is required to be answered against the revenue.

11.In the result, the tax case appeal is dismissed and the Substantial Question of law is answered against the revenue. No costs.

Sd/-
Assistant Registrar

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Sub Assistant Registrar

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To

1.The Income Tax Appellate Tribunal,
Madras 'C' Bench.

2.The Commissioner of Income Tax (Appeals),
Corporate Circle 1(2),
Chennai.

3.The Deputy Commissioner of Income Tax ,
Corporate Circle 1(2),
Chennai.

+1 cc to M/s.T.Ravikumar, Advocate Sr.No. 28527

TCA.No.439 of 2018

RLD(CO)
RMP(20/10/2020)