IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 11.09.2020

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

T.C.A.No.466 of 2018

Principal Commissioner of Income Tax 6
No.121, Mahatma Gandhi Road,
Chennai. .. Appellant

Versus

Shri.GopalSrinivasan .. Respondent

Prayer:- Tax Case Appeal filed under Section 260-A of the Income Tax Act, 1961, against the order of the Income Tax Appellate Tribunal, ''C'' Bench, Chennai dated 11.01.2018 in I.T.A.No.1423/Mds/2016.

Appeal against the order dated 10.02.2016 made in ITA.No.93/CIT(A)-15/14-15 on the file of the Commissioner of Income Tax (Appeals) -15, Chennai 600 034. for the Assessment year 2008-09.

And as against the order dated 31.01.2014 made in PAN AADPG9543P on the file of the Assistant Commissioner of Income Tax, Company Circle VI (4), Chennai for the Assessment Year 2008-09.

And as against the order dated 16.12.2010 made in PAN/GIR.No. AADPG9543P/SSU50P1 on the file of the Assistant commissioner of Income Tax, Company Circle VI(4), Chennai for the Assessment Year 2008-09.

For Appellant: Mr.J.Narayanasamy
Senior Standing counsel
For Respondent: Mr.R.Vikram Vijayaraghavan
for M/s.Subbaraya
Aiyar Padmanabhan

JUDGMENT
[Order of the Court was made by T.S.SIVAGNANAM, J.]

This appeal, filed by the Revenue, under Section 260A of the Income Tax Act, 1961 ('the Act' for brevity) is directed against the order dated 11.01.2018 passed by the Income Tax Appellate Tribunal Bench 'C' Chennai ('the Tribunal' for brevity) in I.T.A.No.1423/Mds/2016, for the assessment year 2008-09. The Revenue has raised the following substantial question of law:

> ''1.Whether the Appellate Tribunal is correct in holding that the assessee is entitled to the exemption u/s 10(23FB) despite the fact that (STT) Security Transaction Tax liability was borne by the Venture Capital Fund and not by the assessee?''

2. We have elaborately heard Mr.J.Narayanasamy, learned Senior Standing counsel for the appellant / assessee and Mr.R.Vikram, learned counsel for the respondent / assessee.

3. The assessee is an individual and a Director of Public Limited Company and filed the return of income for the Assessment Year under consideration ('AY 2008-09') on 30.07.2008, admitting an income of Rs.3,56,05,420/-. The case was selected for scrutiny and assessment was completed accepting the returned income declared by the assessee. Subsequently the assessment was reopened under Section 147 of the Act and completed by order dated 31.01.2014, assessing a total income at Rs.5,50,10,269/-. The Assessing Officer while completing the assessment pointed out that the assessee received Rs.1,68,21,005/- as Distribution of income received from ICICI Emerging Sector Fund and there was a discrepancy between the income of Rs.1,68,21,005/- received and Rs.2,22,54,099/- and differences amounting to Rs.54,33,094/- which was added by the Assessing Officer as 'Income From Other Sources'. The assessee claimed exemption on Long Term Capital Gain ('LTCG') of Rs.1,36,16,621/- as received from the ICICI Emerging Sector Fund as per Form 64 as Security Transaction Tax ('STT') was suffered. The Assessing Officer held that there is no exemption available for such transaction, more particularly, because the STT liability is borne by the Venture Capital Fund and not by the assessee and Section 115U of the Act is only a deeming provision supplement to Section 10(23FB), where any income is exempted in the case of Venture Capital fund and hence the question of application of Section 10(38) of the Act does not arise.

4. Aggrieved by such order, the assessee filed an appeal before the Commissioner of Income Tax (Appeals)-15, Chennai ['CIT(A)']. The CIT(A) confirmed the addition of Short Term Capital Gain (STCG) stating that the assumption made by the Assessing Officer regarding the share of profit on sale of shares, had suffered STT. In doing so, followed certain decisions of the Tribunal, Delhi. Aggrieved by such order, the Revenue filed Appeal before the Tribunal. The Tribunal by the Impugned Order remanded the matter to the Assessing Officer for

considering the claim on STCG afresh, in the light of the conditions specified under Section 111A of the Act. Further the Tribunal after noting the factual position agreed with the finding of the CIT(A) and directed the Assessing Officer to consider the claim of the assessee under Section 10(23FB) read with Section 115U of the Act.

5. The Revenue is before us contenting that the Tribunal erred in holding that the assessee is entitled to exemption under Section 10(23FB) despite the fact that the STT liability was borne by the Venture Capital Fund and not by the assessee.

6. During the course of argument, Mr.J.Narayanasamy, learned Senior Standing Counsel vehemently contended that there are certain additional Substantial Questions of Law in the instant case which needs to be considered by this Court, while deciding this appeal. One of such submission is on the ground that Section 115U(1) commences with a non-obstante clause and other provision has been excluded and therefore seeks to argue certain other issue relatable to the said point canvassed by the learned Senior Standing Counsel.

7. In our considered view, no occasion has arisen before this Court to consider such question because what was projected by the Revenue in this Appeal was with regard to the fact as to whether the STT liability has not been borne by the Venture Capital Fund? ; Whether the assessee would be entitled to the benefit of the exemption under Section 10(23FB)?. This is entirely a factual issue which has been considered by the CIT(A) in a proper perspective. The assessee contented that under Section 10(23FB) of the Act, any income of the Venture Capital Fund is exempt from taxation, however under Section 115U(1) of the Act any income accruing by the Investor out of the investments made in Venture Capital Fund shall be chargeable to tax in the same manner as if it were the income accruing to such investor had he made investments directly in the Venture Capital Undertaking. Further it was contended that under Section 115U(3) of the Act, the income credited by the Venture Capital Fund shall be deemed to be of the same nature and in the same proportion in the hands of the investor, as it had been received or accrued to the Venture Capital Fund. Therefore it was contended that the income from Venture Capital Fund, accrued to the investor's share of same nature under Section 115U(1) of the Act and is chargeable to tax in the same manner as under Section 115U(3) of the Act. Thus it was contended that they converted the said income in the same nature as LTGS - STT which chargeable to tax in the same manner.

8. Further the assessee specifically stated that the STT

paid on such transaction is borne by the assessee and was debited to the account of the assessee by the Venture Capital Fund as stated by the Assessing Officer in its order. Therefore, the assessee claimed that they are entitled for exemption under Section 10(38) of the Act. Further under Section 115U(5) of the Act, the income received by the Venture Capital Fund is taxable on accrual basis, whether distributable or not to the investor and therefore, the exemption under Section 10(38) is not claimed on the distribution as stated by the Assessing Officer in its order. This submission was taken note of and the CIT(A) has recorded the factual finding that STT paid on the transaction is borne by the assessee and the same was debited to the account of the assessee by the Venture Capital Fund as admitted by the Assessing Officer himself in the Assessment Order. Further taking note of the decision of the Delhi Tribunal in the case of Japan International Cooperative Agency dated 29.01.2016, the issue was decided in favour of the assessee. The correctness of the factual finding recorded by the CIT(A) was tested by the Tribunal as well as noting the provision of Section 10(23FB) and Section 115(U) of the Act. After taking note of the factual position, the Tribunal affirmed the order passed by the CIT(A). Thus we find there is no Substantial Question of Law arises for consideration in this appeal as the entire matter revolves on factual aspects which was not only endorsed by the Assessing Officer while denying the relief. This error was corrected by the CIT(A) and affirmed by the Tribunal. Hence no ground is made out by the Revenue to interfere with the order passed by the Tribunal.

9. In the result, the Appeal filed by the Revenue is dismissed, as no Substantial Question of Law arises for consideration. No costs.

Sd/-

Assistant Registrar (CCC)

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Sub Assistant Registrar

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To

1.The Income Tax Appellate Tribunal,
"C" Bench, Chennai.

2.The Commissioner of Income Tax (Appeals)-15,
Chennai 600 034.

3.The Assistant commissioner of Income Tax,
Company circle VI (4),
Chennai.

+1cc to Mr.Subbaraya Aiyar, Advocate, S.R.No. 29833

T.C.A.No.466 of 2018

LN(CO)
GN(15/10/2020)