

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 18.11.2020

CORAM

THE HON'BLE DR.JUSTICE VINEET KOTHARI
AND
THE HON'BLE MR.JUSTICE M.S.RAMESH

Tax Case (Appeal) No.433 of 2017

The Commissioner of Income Tax,
Chennai.

...Appellant

Vs.

M/s.Shree Ganesh Ventures,
14A Ennore High Road,
Chennai 600 019.
PAN: AAOFS0487K

...Respondent

Tax Case (Appeal) filed under Section 260A of the Income Tax Act, 1961 against the order of the Income Tax Appellate Tribunal, 'C' Bench, Chennai, dated 29.9.2016 made in ITA No.2344/Mds/2015.

Against the order dated 22.07.2016 & 16.03.2016 made in I.T.A. No. 2344/Mds/2015 on the file of the Income Tax Appellate Tribunal, 'C' Bench, Chennai

against the order of the Commissioner of Income Tax (Appeals)-5, Chennai dated 18.11.2015 made in I.T.A. No. 305/CIT (A)-5/2013-2014.

Against the order of the Deputy Commissioner of Income Tax, Circle XII, Chennai dated 30.12.2009 under section 143(3) of the Income Tax Act 1961 for the Assessment year 2007-2008.

For Appellant : Ms.R.Hemalatha,
Senior Standing Counsel

For Respondent : Mr.M.V.Swaroop

JUDGMENT

(Delivered by DR.VINEET KOTHARI,J)

This Appeal was admitted on the following questions of law by this Court on 20.7.2020:-

"(i) Whether the learned Income Tax Appellate Tribunal has power to review its order on a Miscellaneous Application filed by the Revenue

Department and pass a fresh order on merits, which is contrary to the earlier order passed under Section 254(2) of the Income Tax Act, 1961?

(ii) Whether the Tribunal is right in deleting the Additions made by the Assessing Authority under Section 68 of the Income Tax Act, with regard to the two Dealers viz., M/s.D.G.Traders and M/s.Ganesh Steels, from whom the Assessee is said to have received Iron, for the Dealers not being produced by the Assessee or they could not be located in their registered premises during the course of Survey, and can it be dealt with in the subsequent hearing by the Tribunal by review under Section 254, upon a Miscellaneous Application filed by the Revenue Department?

(iii) Whether on the facts and in the circumstances of the documentary evidence on record before the Assessing Authority as well as the learned Tribunal which is not scrutinized by the Tribunal while passing the order on Appeal filed by the Assessee can amount to a mistake apparent on the face of record within Section 254(2) of the Act entitling the Tribunal to recall its earlier order?"

2. The learned Tribunal initially upheld the additions made in the declared income of the Assessee vide order dated 16.3.2016 for the Assessment Year 2007-2008 with the following observation:-

"Ground Nos. 1 & 2 (Unexplained Cash credit): -

4. Additions of Rs.2,79,06,603/- & Rs.2,19,69,862/- being credits in the names of M/s.Sree Ganesh Steels & M/s.D.G.Traders respectively as undisclosed income of the assessee.

The learned Assessing Officer had made addition of Rs.4,98,76,465/- invoking section 68 of the Act because the identity and genuineness of the sundry creditors M/s. Sree Ganesh Steels for Rs.2,79,06,603/- & M/s.D.G.Traders for Rs.2,19,69,862/- was not established. The learned Assessing Officer had issued notice under Section 133(6) to the above sundry creditors, but the letter was returned stating that no such entity existed in that address. Subsequently, after several opportunities provided by the learned Assessing Officer which is vividly explained in his order additions were made invoking the provisions of section 68 of the Act for Rs.4,98,76,465/-. Before the learned Commissioner of Income Tax (Appeals) also the assessee could not establish the

identity and creditworthiness of the creditors. Therefore the learned Commissioner of Income Tax (Appeals) confirmed the order of the learned Assessing Officer. Even before us, neither the assessee nor its Authorized Representative could produce any materials with cogent evidence to establish the identity and genuineness of the creditors. Therefore, we do not have any other option but to confirm the orders of the Revenue on this issue."

3. The Assessee moved a Miscellaneous Application pointing out about the identity and genuineness of the creditors, M/s.Shree Ganesh Steels and M/s.D.G.Traders and that there was also material on record including PAN Numbers, the Invoices from those creditors, etc. but, the learned Tribunal failed to take note of the same while passing the order on 16.3.2016 and therefore, the said order deserves to be revoked, reviewed and rectified under Section 254 of the Act and fresh order has to be passed on the same.

4. The learned Tribunal accepted the mistake on its part and the same Hon'ble Accountant Member (Mr.A.Mohan Alankamony) recalled the order dated 16.3.2016 vide order dated 22.7.2016 in Miscellaneous Application No.54/Mds/2016 in ITA No.2344/Mds/2015 and passed the order with the following observation:-

"2. Before us, the learned Authorized Representative submitted that with respect to the addition made under section 68 in regard to the creditors M/s.Shree Ganesh Steels and M/s.D.G.Traders, the Tribunal in its order dated 16.3.2016 has stated that "even before us neither the assessee nor its Authorized Representative could produce any material with cogent evidence to establish the identity and genuineness of the creditors" and with this finding confirmed the order of the Revenue. The learned Authorized Representative submitted that various details such as invoice from these creditors disclosing their address, sales-tax registration number etc. were furnished in the paper book which was either not examined or brought to notice before the Bench. Further, the learned Authorized Representative submitted that even for the disallowance made under section 40A(3) of the Act for Rs.17,20,000/-, the Tribunal had arrived at a similar decision without examining the materials on record. For the above stated reasons the learned Authorized Representative pleaded that the order of the Tribunal may be recalled for considering these facts and rectifying the mistakes that had crept into the order of the Tribunal while arriving at the derision on the earlier occasion.

3. The learned Departmental Representative vehemently opposed to the submissions of the learned Authorized Representative by arguing that all these facts were considered by the Bench while arriving its decision on the earlier occasion. It was therefore requested that the order of the Tribunal may be confirmed.

4. We have heard the rival submissions and carefully perused the materials available on record. From the arguments of the learned Authorised Representative and on examining the order of the Tribunal, it is apparent that the documents furnished by the assessee in the paper book was lost sight off and were not examined by the Bench on the earlier occasion and there is no discussion with respect to the same in the order of the Tribunal. Therefore in the interest of justice, we hereby recall the order of the Tribunal in order to examine the materials on record pointed out by the assessee and thereafter rectify the mistake if any, in the order of the Tribunal. The Registry is directed to post the appeal for hearing in due course and intimate both the parties."

5. After hearing both sides, the Tribunal finally partly allowed the Appeal of the Assessee for the Assessment Year 2007-2008 vide its order dated 29.9.2016 and granted the requisite relief by setting aside the additions under Section 68 of the Act with the following observation:-

"Ground Nos.1 & 2 (Unexplained cash credit):-

Additions of Rs.2,79,06,663/- & Rs.2,19,69,862/- being credits in the names of M/s.Sree Ganesh Steels & M/s.D.G.Traders respectively as undisclosed Income of the assessee:

4. The learned Assessing Officer had made addition of Rs.4,98,76,465/- invoking section 68 of the Act because the identity and genuinenesses of the sundry creditors M/s.Sree Ganesh Steels for Rs.2,79,06,603/- & M/s.D.G.Traders for Rs.2,19,69,862/- was not established because of the following reasons:-

i) The learned Assessing Officer had deputed his Inspector to serve notice under section 133(6) of the Act to M/s.D.G.Traders in the address provided by assessee. However the Inspector could not locate the concern M/s.D.G.Traders. On enquiry in the locality, it was revealed that no such concern operated in that area.

ii) When the same was informed to the assessee firms' partner Mr.M.R.Goyenka though he requested for time for producing the sundry creditors, he was not able to do so.

iii) With respect to the letter sent to M/s.Sree Ganesh Steels, it was replied by them that they did not have any dealings or transaction with the assessee firm.

iv) On examining the payment made to M/s.Sree Ganesh Steels from the current account maintained by the assessee in its bank A/c., it was revealed that the amount was paid to various individuals other than M/s.Sree Ganesh Steels.

v) The assessee's contention with respect to M/s.DG Traders was that the enquiries were made three years after the transaction and the assessee had relied on the address given by the parties at the time of the transaction which was not acceptable to the Ld. A.O.

vi) The assessee's contention that purchases were made through mediators and therefore the assessee did not have direct accessibility to its creditors was also not acceptable to the Ld. A.O.

vii) The goods were purchased from the sundry creditors who are scrap dealers in the unorganized sector of business can also be not treated as valid reason for not proving the identity of the sundry creditors.

viii) Enquiries from the partners of the firm and staff also revealed that transactions were not genuine.

5. On appeal, the learned Commissioner of Income Tax (Appeals) upheld the order of the learned Assessing Officer agreeing with his findings.

6. Before us, the learned Authorized Representative made the following submissions:-

i) Both the additions were made based on enquiries behind the back of the appellant; therefore it is in violation of principles of natural justice.

ii) The enquiries made by the Inspector were not put before the assessee for rebuttal.

iii) The additions are made for not proving the sundry creditors at the same time the purchases made by the assessee is not in dispute.

iv) The assessee has furnished the details of its quantitative purchase, sales and stock tally before the Revenue.

v) The assessee has discharged its prima facie burden for proving the genuineness of the purchase. Since there was a time lag for making enquiries and the purchases related to scrap which is in the business falling in unorganized sector, it was difficult to locate the sundry creditors.

vi) The purchases made by the assessee were also not doubted by the Central Excise Authorities.

vii) The sales tax registration and CST registration of sundry creditors were furnished to the Revenue which proved that the identity of the sundry creditors.

Further the learned Authorised Representative submitted a paper book containing 1 to 60 pages which were true copies of the originals which form part of the records produced before the Revenue such as i) details of Sales Tax (VAT, CST registration numbers of M/s DG Traders and Sree Ganesh Steels, statement of purchases made from M/s.DG Traders and Sree Ganesh Steels, invoices for the entire period of purchase from both the parties and the requisite details submitted before sales tax authorities etc.

7. The learned Departmental Representative on the other hand reiterated the findings made by the learned Assessing Officer and the learned Commissioner of Income Tax (Appeals) in their respective orders and argued in support of the same.

8. We have heard the rival submissions and carefully perused the materials available on record. As pointed out by the learned Authorized Representative the assessee has provided TNGST numbers of the sundry creditors and certain other details to prove their identity and genuineness of the transaction. At the same time, the Department has a genuine reason for not accepting the same because they were not able to locate the sundry creditors, the invoices submitted by the assessee from both the parties appears to have been made by the same person etc. However, from the facts of the case, it is not disputed that the sundry creditors pertain to purchases of scrap. Normally, the trading of scrap takes place in the unorganized business sector and unregulated market from where the assessee has to depend on procuring its raw materials. Generally the margin of profit in the nature of business of the assessee is minimal as less as one per cent or

even lesser. There is also no finding by the Revenue that the assessee had not purchased scrap but the only doubt was with respect to the genuineness of two sundry creditors who had supplied raw materials to the assessee. Further the assessee has submitted the following materials to show that the sundry creditors were genuine:-

i) Order of the Assistant Commissioner of Sales Tax dated 12.9.2016 and notice of demand from ACST dated 12.9.2016 to show the genuineness of the local purchases of iron & steel (at page No.196 & 198 of the paper book).

ii) Details of TIN number, CST Number and PAN of M/s.DG Traders and M/s.Sree Ganesh Steels (at page 199 of the paper book).

iii) Details of TIN, CST No. downloaded from the relevant Govt. website which shows that both M/s.DG Traders and M/s.Sree Ganesh Steels were active dealers under the CST Act (page No.200 to 203 of the paper book).

iv) PAN No. of M/s Sree Ganesh Steels and M/s.DG Traders (Suresh Singh Solanki) (downloaded from the Govt. Website).

9. From these documents which is part of the record and not(sic) before the Tribunal at the time of earlier hearing proves the fact that the identity of these sundry creditors are genuine. Since the above referred documents were lost sight off by the Tribunal on the earlier occasion, mistake had crept into the Order of the Tribunal which is apparent on record because of non-consideration of certain facts. Further, it is also evident that the assessee had paid by cheque to the sundry creditors, may be not directly by (sic) indirectly which is not prohibited by the Act. Further there is also no other finding by the Revenue on these aspects. Thus, when the identity of the sundry creditors is proved and when the quantity of purchase of raw materials is not in dispute, then the transaction cannot be treated as bogus. Therefore, we are of the considered view that the learned Assessing Officer is not justified in invoking the provisions of section 68 of the Act with regard to both these sundry creditors. Hence, we hereby direct the learned Assessing Officer to delete the addition made by invoking the provisions of section 68 of the Act with regard to both these sundry creditors. Thus the issue is decided in favour of the assessee."

6. Aggrieved by the same, the Revenue has filed the present Appeal before us under Section 260A of the Act raising the aforesaid questions of law.

7. Having heard the learned counsel for the parties, we are of the opinion that the Rectification of the earlier order dated 16.3.2016 passed by the learned Tribunal falls within the four corners of Section 254 of the Act and when once the learned Tribunal, particularly, the same Member of the Tribunal admitted that the record or Paper Book before the Tribunal already contained relevant material which was lost sight of and ignored by the learned Tribunal, there was a justifiable cause for recall and rectification of the earlier order and considering the materials which was already on record of the learned Tribunal and the learned Tribunal, therefore, rectified the order and granted the requisite relief by deleting the additions under Section 68 of the Act with respect to the said two Dealers.

8. The contention of the learned Senior Standing Counsel appearing for the Revenue Mrs.Hemalatha is that the said material was never before the original Assessing Authority or before the first Appellate Authority and therefore, the Tribunal has erred in taking the same into account, is rather misconceived.

9. The powers of assessment vested with all the three Authorities including the Appellate Authorities are co-extensive in law and there is no prohibition in law in producing the relevant materials before the permission of the second Appellate Authority viz., the Tribunal. There is no dispute or question raised about the manner in which the said documents were placed before the learned Tribunal. It is only the question whether the learned Tribunal failed to take note of the said relevant evidence while passing the original Appellate Order.

10. Since the learned Tribunal found that the said material was already on the record of the learned Tribunal, when it passed the order on 16.3.2016, we cannot doubt that the material was produced before the learned Tribunal in a doubtful manner. No such objection was raised by the Revenue before the learned Tribunal itself. Therefore, the question of material being on record of the learned Tribunal is beyond the pale of doubt and the finding of the learned Tribunal binds us.

11. As far as the question of deletion of additions under Section 68 of the Act is concerned, since the learned Tribunal, after considering the materials which were already on the record of the Tribunal, like TIN Number, PAN Number, Invoices, etc., of

these two Trade Creditors/Sellers and it has granted the requisite relief to the Assessee, we do not find any question of law to be arising on this issue. Further, with regard to the scope of Section 254 of the Act, we find that ignoring the material already on record on the part of the learned Tribunal was a mistake apparent on the face of record under Section 254 and the learned Tribunal has, in our opinion, rightly recalled its order and rectified the mistake and it has rightly set aside the additions under Section 68 of the Act and they are only findings of facts based on relevant material.

12. Therefore, the questions of law framed are answered against the Revenue and in favour of the Assessee. With the above observations, the Appeal of Revenue is liable to be dismissed and accordingly, it is dismissed. No order as to costs.

s/d-
Assistant Registrar

True Copy

Sub-Assistant Registrar

ssk.
To

1. Income Tax Appellate Tribunal,
'C' Bench, Chennai
2. The Commissioner of Income Tax,
(Appeals)-5
Chennai.
3. The Deputy Commissioner of
Income Tax, Circle XII
Chennai

+1 Cc to Mr.T. Ravikumar, Advocate sr 37086.
+1 CC to Mr.M.V.Swaroop, Advocate sr 37203.

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T.C.(A) No.433 of 2017

GP(CO)
SP(15/12/2020)