

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 11.9.2020

CORAM

THE HON'BLE DR.JUSTICE VINEET KOTHARI
AND
THE HON'BLE MR.JUSTICE KRISHNAN RAMASAMY

Tax Case (Appeal) Nos.772 to 774 of 2017

Principal Commissioner of Income Tax-2,
No.63, Race Course Road,
Coimbatore.

Appellant in all the 3 cases

Vs.

M/s.Bharathi Constructions,
No.119, Power House Road,
Erode 638 001.
PAN: AAB FB 9308 F

Respondent in TCA 772/2017

M/s.URC Construction (P) Ltd.,
No.119, Power House Road,
Erode 638 001.
PAN: AAA CU 2425 Q

Respondent in
TCA 773 & 774 of 2017

Tax Case (Appeals) filed under Section 260A of the Income Tax Act, 1961 against the order of the Income Tax Appellate Tribunal, 'C' Bench, Chennai, dated 20.4.2017 made in ITA Nos.1871/Mds/2016, 2759/Mds/2016 and 1870/Mds/2016.

Against the Order of the Commissioner of Income Tax (Appeals 3), Coimbatore, dated 30.06.2016 in ITA No.321/15-16 in the assessment year 2008-2009.

Against the Order of the Commissioner of Income Tax (Appeals 3), Coimbatore dated 31.03.2016 in ITA No.23/15-16 in the assessment year 2007-2008.

Against the Order of the Assistant Commissioner of Income Tax circle 1, Erode 638001, dated 25.01.2016 & 11.03.2015 PAN NO.AAACU2425Q in the assessment year 2008-2009 & 2007-2008.

Against the Order of the Deputy Commissioner of Income Tax Circle 1, Erode dated 30.03.2010 & 30.12.2009 PAN/GIR No.AAACU2425Q in the Assessment year 2008-2009 & 2007-2008.

For Appellant : Mr.T.R.Senthilkumar
Senior Standing Counsel assisted by
Mrs.K.G.Usharani, Jr.Standing Counsel

For Respondents : Mr.M.P.Senthilkumar

COMMON JUDGMENT

(Delivered by DR.VINEET KOTHARI,J)

The present Appeals are filed by the Revenue under section 260A of the Income Tax Act by raising the following purported substantial questions of law arising from the order passed by the Income Tax Appellate Tribunal on 20.4.2017 for the Assessment Years 2007-2008 and 2008-2009 in the case of two Assessee viz., URC construction (P) Ltd., Erode and Bharathi Constructions, Erode:-

- i) Whether the ITAT is correct in law in quashing the reassessment order made under Section 143(3) read with Section 147 of the Income Tax Act, on the ground that reassessment initiated after four years and no fresh material on record for such reassessment proceedings?
- ii) Whether the ITAT is correct in law in quashing the reassessment order without considering Explanation 1 and Explanation 2(c) to Section 147 of the Income Tax Act, when there was a failure on the part of the assessee to disclose fully and truly all material facts necessary for assessment?
- iii) Whether the Appellate Tribunal was right in forming an opinion that the assessee has furnished all the details and when the assessee only produced the books of accounts but did not make fully and truly disclosure in Tax Audit Report which is an annexure to the return of income?"

2. The learned Tribunal has decided in favour of the Assessee that the Assessing Authority was not entitled to invoke the proviso to Section 147 of the Act and reopen the Assessment for those Assessment Years on the ground of failure on the part of the Assessee to truly and fully disclose the relevant materials before the original Assessing Authority, who passed the Scrutiny Assessment Order under Section 143(3) of the Act.

3. The relevant portion of the order passed by the learned Tribunal is quoted below for ready reference:-

"8. From the above it appears that the allegation against the assessee is non-deduction of tax at the time of payment. A copy of the assessment order passed under Section 143(3) of the Act in the case of M/s.URC Construction Pvt. Ltd. is available

at page 68 of the paper-book. The Assessing Officer, after considering the facts that the assessee being civil contractors, asked the assessee to furnish list of shareholders, TDS certificate, details of opening stock, work in progress details, purchase details, details of sub-contract payments, payment of wages, interest, etc. before the Assessing Officer. The Assessing Officer has also called upon the assessee to produce the details of secured loan availed from bank and other financial institutions. The Assessing Officer has also conducted enquiry through Inspector of Income-tax in order to ascertain genuineness of sundry creditors. After examining the material, the Assessing Officer observed as follows at page 2 of the assessment order, copy of which is available at page 69 of the paper-book in the case of M/s.URC Construction Pvt. Ltd.:-

"On a perusal of details filed, it is seen that the assessee has not included TDS receipts of Rs.13,57,306 as income. Hence, the same is brought to tax.

(Add: Rs.13,57,306)

The assessee has defaulted in TDS payments on audit fees and hire charges paid of Rs.44,45,185. Hence the said sum of Rs.44,45,185 is disallowed u/s. 40(a)(ia) of the Income-tax Act, 1961.

(Add: Rs.44,45,185)"

9. Therefore, it is obvious that the entire TDS certificates, opening stock, gross receipts from contractors, details of purchase, list of shareholders, copy of current account, copy of sales tax, general expenses claimed by the assessee, vehicle hire charges were available before the Assessing Officer.

10. Now the contention of the Revenue before this Tribunal is that the audit reports under Section 44AB of the Act do not disclose correct and full particulars. The assessee has furnished all the details before the Assessing Officer. The auditor, who prepared the report under Section 44AB of the Act, is expected to examine all the materials and record the same in the report prepared under Section 44AB of the Act. If the auditor fails to record the lapses committed by the assessee, the assessee cannot be blamed for the same. Auditor being expert in accountancy, he has to examine the material independently and prepare the report as required under Section 44AB of the Act. The

assessee, at the best, can produce all the relevant material before the auditor for the purpose of preparing the audit report.

11. Preparation of audit report is the exclusive function of auditor, therefore, if at all there was any negligence and omission to disclose correct fact in the report prepared under Section 44AB of the Act, this Tribunal is of the considered opinion that the assessee cannot be found fault. If the assessee suppresses any material either before the auditor or before the Assessing Officer, then we may say there was negligence on the part of the assessee. In this case, the Assessing Officer himself called upon the entire details of gross receipts, TDS certificates, details of opening stock, work in progress, payment of wages, payment of interest, payment of vehicle hire and machinery charges, copy of sales tax order, etc. Therefore, when the assessee has furnished all the details which are required in completing assessments, this Tribunal is of the considered opinion that mere omission of auditor to mention certain items in the audit report prepared under Section 44AB of the Act, that alone cannot be a reason to say that there was negligence on the part of the assessee. This Tribunal is of the considered opinion that when the assessee furnished all the details, there was no negligence on the part of the assessee, hence, proviso to Section 147 of the Act would come into operation. In view of the above, the order passed by the Assessing Officer is barred by limitation. Therefore, it cannot stand in the eye of law. Accordingly, the orders of both the courts below for all the three years are set aside and the appeals of the assessee stand allowed."

4. The learned Senior Standing Counsel appearing for the Revenue Mr.T.R.Senthilkumar has urged before us that there was failure on the part of the Assessee to disclose truly and fully the Machine Hire Charges on which the Tax Deduction at Source under Section 194-I was required to be done by the Assessee Company, who utilized the Plants and Equipments of the Contractors during the construction works carried out by it and therefore on such payments of rent made by the Assessee to such contractors for user of such Plant and Equipments Tax Deduction at Source was required to be done by the Assessee under Section 194-I of the Act and in the absence of the same, the amounts in question paid to the Contractors was liable to be added back as income of the Assessee under Section 40(a)(ia) of the Act. He submitted that an Audit Objection was also raised for those Assessment Years by the Audit Team of the Department and in the

subsequent Assessment Years 2010-11 and 2011-12, the Assessee himself deducted Tax at Source on such Machine Hire Charges and deposited the same under section 194-I of the Act and in the year 2015, the Assessing Authority had "reason to believe" that for Assessment Years 2007-2008 and 2008-2009, it was liable to reopen and reassessment was required to be done for those Assessment Years, which are under challenge before us.

5. Against the re-assessment order, the Appeals preferred by the Assessee were dismissed by the learned Commissioner of Income Tax (Appeals) and in the Appeal before the learned Tribunal, the Assessee succeeded and the learned Tribunal held that reassessment was bad in law as the notice issued under Section 147/148 was issued after expiry of four years after the relevant Assessment Year and there was no failure on the part of the Assessee and therefore the extended period of limitation cannot be invoked by the Authority concerned and the reassessment order was set aside. Aggrieved by the same, the Department is in these Appeals.

6. Per contra, the learned counsel Mr.M.P.Senthilkumar appearing for the Assessee, has drawn our attention to the relevant materials on record and submitted that during the course of Original Assessment Proceedings itself the Assessee had made true and full disclosure of the tax deducted and amount paid by it to various Contractors vide letter dated 7.12.2009 filed before the Deputy Commissioner of Income Tax, Circle-I, Erode through the Chartered Accountant M.Chinnayan & Associates and in reply to the Deputy Commissioner of Income Tax for the Audit Objection, the said Chartered Accountant M.Chinnayan & Associates, vide its communication found at page 60 of the paper book (TCA 774/2017), for the Assessment Year 2007-2008, it was also contended before the Assessing Authority that such amounts paid to the Contractors did not amount to payments of rentals as there was no Lease Agreement and therefore Section 194-I cannot apply to such payments. He further submitted that the Assessing Authority had disallowed a part of the said amounts towards Machine Hire Charges under section 40a(ia) of the Act and the Tax Deducted at Source during the course of Original Assessment Proceedings itself and therefore, there was no reason for the Assessing Authority to reopen the Original Assessment Order on a mere "change of opinion" subsequently in the year 2015 and the reassessment Proceedings could not be undertaken by the Assessing Authority. In particular, Mr.M.P.Senthilkumar drew our attention to the order sheet entry drawn on 30th December 2009 passed by the Deputy Commissioner, the Assessing Authority, which is quoted below for ready reference:-

"Sri.Chinnayan, AR appeared and submitted details called for. Case heard. The Assessee has claimed machinery & centering material repairs and maintenance at Rs.2,30,67,332/- and vehicle

maintenance & repairs at Rs.58,01,668/- which are supported partly by self vouchers and are paid partly in cash. As the same appears to be excessive, 5% of the above said expenses amounting to Rs.14,43,450/- is disallowed as being excessive. Further, the Assessee has not included TDS receipts of Rs.13,57,306/- as income. Hence, the same is brought to tax. The Assessee has defaulted in TDS payments on hire charges & audit fees paid. Hence, the said sum of Rs.44,45,185/- is disallowed under Section 40(a)(ia)."

7. Having heard the learned counsel appearing for the parties, we are of the clear opinion that no substantial question of law arises in the present Appeal filed by the Revenue, as the law is well settled in this regard and unless as a matter of fact, the Revenue Authority can establish a failure on the part of the Assessee to truly and fully disclose the relevant materials during the course of original Assessment Proceedings, the reassessment proceedings, on mere change of opinion, cannot be initiated much less beyond the period of four years after the expiry of the Assessment Years, in terms of the first Proviso to section 147 of the Act.

8. In the present case, it appears that Machine Hire Charges paid by the Assesseees to various Contractors or Sub-Contractors were fully disclosed not only in the Books of Accounts and Audit Reports furnished by the Tax Auditor, but way of replies to the notice issued by the Assessing Authority particularly vide letter dated 7.12.2009 of the Assessee during the course of Original Assessment Proceedings and it was also contended while giving reply to the Audit Objection that the payments, having been made as Machine Hire Charges, do not amount to rentals and thereby did not attract Section 194-I of the Act, but, despite that the Assessing Authority appears to have made additions to the extent of Rs.44,45,185/- in Assessment Year 2007-2008 under Section 40(a)(ia) of the Act in case of one of the Assesseees viz., URC Construction (Private) Limited. The facts in both the Assesseees' case are said to be almost similar and it was represented by the same Chartered Accountant M/s.Chinnayan & Associates, Erode.

9. Thus, we do not see any failure on the part of the Assessee to truly and fully disclose the relevant materials before the Assessing Authority during the course of Original Assessment Proceedings. In view of the same, the extended period of limitation beyond four years after the end of relevant Assessment Years, cannot be invoked for the re-assessment proceedings under Section 147/148 of the Act in view of the first Proviso to Section 147 of the Act.

10. However, we are not inclined to agree with the observations made by the learned Tribunal in para 11 of its

order quoted above to the extent where the learned Tribunal has stated that if there is negligence or omission on the part of the Auditor to disclose correct facts in the Audit Report prepared under Section 44AB of the Act, the Assessee cannot be faulted.

11. In our opinion, even if the relevant facts are not placed before the Auditors by the Assessee himself, they may qualify their Audit Report under Section 44AB of the Act. If the Auditor's Report does not specifically disclose any relevant facts, or if there is any omission or non-disclosure, it has to be attributed to the Assessee only rather than to the Auditor. There are no facts placed before us like this that the Assessee had disclosed the relevant facts, but, still the Auditor failed to disclose the same in his Audit Report. Therefore, the observation made in para 11 of the order is not sustainable though they do not affect the conclusion which we have arrived at on the basis of other facts placed before us that there was really a disclosure of full and complete facts by the Assessee before the Assessing Authority during the course of Original Assessment Proceedings itself under Section 143(3) of the Act and therefore, even if anything is not highlighted in the Audit Report, the Assessee has shown that this aspect viz., non-deduction of TDS on the Machine Hire Charges attracting Section 194-I of the Act was very much discussed by the Assessing Authority during the original Assessment proceedings.

12. Therefore, we are of the opinion that on a mere change of opinion, the Assessing Authority could not have invoked the reassessment proceedings under Section 147/148 of the Act beyond the period of four years after the end of relevant Assessment Years. There is no dispute that the impugned notices under Section 147/148 were issued beyond the period of four years after the relevant Assessment Years viz., 2007-2008 and 2008-2009. The four years had expired in the year 2013, but, the notices were issued in the year 2015.

13. Thus, we do not find any substantial question of law to be arising in the present Appeals filed by Revenue and therefore, the Appeals are devoid of merit and are liable to be dismissed. Accordingly, they are dismissed. No order as to costs.

Sd/-

Assistant Registrar

//True Copy//

Sub Assistant Registrar

To

1. Principal Commissioner of Income Tax
No.63, Race Course Road, Coimbatore.

2. The Asst. Commissioner of Income Tax,
Circle 1, Erode 638 001.
3. M/s.Bharathi Constructions,
No.119, Power House Road,
Erode 638 001.
4. M/s.URC Construction (P) Ltd.,
No.119, Power House Road,Erode 638 001.
5. The Commissioner of Income Tax Appeals-I,
Coimbatore.
6. The Deputy Commissioner of Income Tax Circle 1,
Erode

+lcc to Mr.Senthil Kumar, Advocate in SR.NO..29832

T.C. (A) Nos.772 to 774 of 2017

MG (CO)
RV (19/10/2020)



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