



BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT
ORDERS RESERVED ON : 25.07.2018
ORDERS PRONOUNCED ON : 03.11.2020

CORAM:

THE HONOURABLE MR.JUSTICE M. GOVINDARAJ

W.P. (MD) No. 5542 of 2012

WEB COPY

Visalakshi Anandkumar,
Rep. by Power of Attorney,
K.Shunmugham.

... Petitioner

Vs.

The Assistant Commissioner of Income Tax,
Circle III, Trichy.

... Respondent

PRAYER : The Writ Petition is filed under Article 226 of the Constitution of India, for the issuance of Writ of Certiorarified Mandamus, to call for the records in the matter of assessment of the petitioner in File No.AANPS3093CACIT/CIR-III/TRY for the assessment year 2002-2003 quash the order dated 06.03.2012 and direct the amount of tax paid on the erroneously admitted capital gain and deleted by the Tribunal with interest thereon from the date of payment to the date of refund.

For Petitioner : Mr.R.Srinivasan

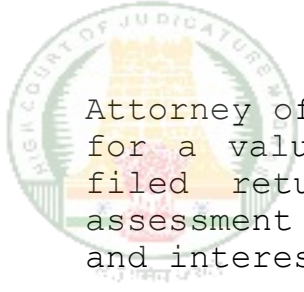
For Respondent : Mr.N.Dilipkumar

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O R D E R

Inveighing the revision order of the assessing authority refusing to refund the tax paid on admitted income, the present Writ Petition has been filed.

2. From the materials placed before this Court by both sides, it is seen that Power of Attorney of the Writ Petitioner entered into a lease agreement in respect of the property at No.149, Luz Church Road, Mylapore, Chennai, and handed over possession. The lessee namely, M/s.Eskee Cee Medical Foundation Pvt. Ltd., (hereinafter referred to as 'ECM') put up construction and run a hospital. Thereafter, the writ petitioner along with ECM entered into a sale agreement with Devaki Hospital Pvt. Ltd. for the sale of the above property on 27.08.1992 for a sale consideration of Rs.1.45 Crores. It was agreed between the writ petitioner and ECM to share the sale proceeds in the ratio of Rs.62,00,000/- to the writ petitioner and Rs.83,00,000/- to ECM. On 27.08.1992, Rs.50,00,000/- was paid to the writ petitioner towards sale consideration. The balance sale consideration was paid on 10.12.1999 and on the same date, the writ petitioner executed a Power of Attorney to one of the



Attorney of the purchaser had made additions and registered the sale for a value of Rs.4.30 Crores on 13.03.2002. The writ petitioner filed returns for the year ended 31st March, 2002, for the assessment year 2002-2003 admitting the income towards capital gains and interest and paid the tax on the advice of the Auditor.

3. However, the Assessment Officer had added the sale consideration of Rs.4.30 Crores in addition to Rs.62,00,000/- received by the writ petitioner and passed an assessment order on 31.10.2006. The Commissioner of Income Tax, by his order dated 29.12.2009, confirmed the Assessment order, against which, the petitioner preferred an appeal to the Income Tax Appellate Tribunal. The Appellate Tribunal, by its order dated 16.12.2010, had quashed the addition of Rs.4.30 Crores under Section 45(5)(b) of the Income Tax Act, 1961, and held that the transfer, as contemplated in Section 2(47) of the Act had happened in the year ended 31.03.1993, the relevant assessment year 1993-1994 and not in Assessment years 2000-2001 or 2002-2003.

4. The Assessing Officer, while giving effect to the Tribunal's order dated 16.12.2010, had re-determined the income at Rs.51,85,268/- as per the returns filed by the petitioner and passed the revised assessment order on 25.02.2011. Thereafter, the petitioner filed a Miscellaneous Petition for clarification with regard to the retention of the capital gains wrongly admitted by the petitioner on the ground that voluntary admission is no ground to assess the same, as there is no estoppel in law. According to the petitioner, the transfer had taken place, as observed in paragraph 7 of the order of the appellate Tribunal on 27.08.1992 and capital gains were assessable only in the relevant year 1993-1994 and not in 2001-2002 or 2002-2003 and hence, voluntary admission made by the assessee on wrong advice, shall be ignored. Since no tax is payable in 2002-2003, the amount remitted shall be refunded.

5. The Tribunal, after considering the petition, by its order dated 09.09.2011, has observed that the relief sought for has to be granted by the assessing authority, if it is justifiable and dismissed the petition, as there is nothing to review or for rectification of any mistakes.

6. Again, the petitioner made a petition to the assessing authority on 03.10.2011 for revision of the assessment order in terms of paragraph 7 of the order of the Appellate Tribunal. The Assessing Authority, by the impugned proceedings dated 06.03.2012, rejected the request.

7. The learned counsel for the petitioner would vehemently contend that there is no estoppel against law. When an income is not assessable in a particular assessment year, even it is wrongly admitted in self assessment, the Income Tax Department shall refund the amount not assessable to tax. When the Appellate Tribunal nullified the assessment order and held that the income is not assessable for the assessment years 2000-2001 or 2002-2003, the assessing authority shall refund the same. Refusal to refund is



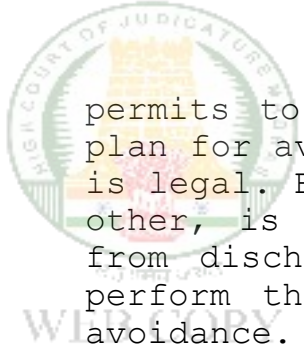
illegal and since the order is passed without jurisdiction, the alternative remedy of appeal need not be availed and hence, the Writ Petition is maintainable.

8. Countering the submissions, the learned counsel for the respondent would submit that the main order of assessment has become final, as there is no challenge to the same and the writ petition challenging the consequential order is not maintainable. The petitioner, having filed a petition for revision of assessment order and after having submitted to the jurisdiction of the assessing authority, cannot turn around and state that the order is without jurisdiction. Since there is an appeal remedy available, non-exhaustion of appeal remedy will render the writ petition not maintainable. Filing the voluntary returns admitting the income on wrong advice is not a ground for refund. The income is assessable to tax and non-payment of tax taking dubious stands is nothing but tax avoidance, which cannot be entertained.

9. Of course, it is an admitted fact that the writ petitioner is an assessee and derived income under the head capital gains for selling the property. The sale agreement was admittedly entered on 27.08.1992 and possession was handed over to the purchaser. However, the amount was not disclosed on the ground that as per the terms of sale agreement, the sale would be complete on registering the property. The balance sale consideration of Rs.12,00,000/- was made on 10.12.1999 and the assessee had executed a Power of Attorney in favour of the purchaser. The possession would have been handed over at least on 10.12.1999 on the date of receipt of balance sale consideration. Therefore, the transfer is complete in view of Section 53-A of Transfer of Property Act on the date of putting the purchaser in possession of the property either on 27.08.1992 or on 10.12.1999. The relevant assessment years for paying the tax is 1993-1994 or 2000-2001.

10. The petitioner has not paid the tax during the assessment year 1993-1994 on the ground that the sale was not complete in terms of the sale agreement. Admittedly, the transfer was complete during the assessment year 2000-2001.

11. Though it was not assessed in the relevant assessment year, the petitioner filed the returns on self assessment and admitted the income and paid the tax with interest. According to the Income Tax Act, the payment of tax belatedly attracts interest. Accordingly, the petitioner filed the returns in the year ended 31.03.2002, the relevant assessment year 2002-2003 and paid the tax on the admitted income. Whether returns were filed for the admitted income on wrong advice or right advice, what is imperative is that payment of tax is mandatory. Only because, the returns for the year 1993-1994 were accepted and an assessment order was passed without demanding the tax on capital gains, in view of Section 53-A of Transfer of Property Act, for the completed transaction, it will not entitle the assessee to avoid tax. There is a huge difference between tax planning and tax avoidance. Whenever and wherever law



permits to pay lesser tax or no tax, the assessee is entitled to plan for availing such benefits to the extent, the law permits or it is legal. But, not paying the tax taking refuge under one pretext or other, is illegal and no law permits a citizen from sulking away from discharging the duty expected by law. If a person omits to perform the duty cast upon him or evades to pay tax, it is tax avoidance. The Hon'ble Supreme Court in **Union of India Vs. Azadi Bacho Andolan and Anr. [(2003) 263 ITR 706]** observed as under:-

"The principle does not involve, in my opinion, that it is part of the judicial function to treat as nugatory any step whatever which a taxpayer may take with a view to the avoidance or mitigation of tax. It remains true in general that the taxpayer, where he is in a position to carry through a transaction in two alternative ways, one of which will result in liability to tax and the other of which will not, is at liberty to choose the latter and to do so effectively in the absence of any specific tax avoidance provision such as s.460 of the Income and Corporation Taxes Act, 1970."

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The situation in the United States is reflected in the following passage from American Jurisprudence's case (American Jurisprudence [1973] second edition, volume 71):

"The legal right of a taxpayer to decrease the amount of what otherwise would be his taxes, or altogether to avoid them, by means which the law permits, cannot be doubted. A tax-saving motivation does not justify the taxing authorities or the courts in nullifying or disregarding a taxpayer's otherwise proper and bona fide choice among courses of action, and the state cannot complain, when a taxpayer resorts to a legal method available to him to compute his tax liability, that the result is more beneficial to the taxpayer than was intended. It has even been said that it is common knowledge that not infrequently changes in the basic facts affecting liability to taxation are made for the purpose of avoiding taxation, but that where such changes are actual and not merely simulated, although made for the purpose of avoiding taxation, they do not constitute evasion of taxation. Thus, a man may change his residence to avoid taxation, or change the form of his property by putting his money into non-taxable securities, or in the form of property which would be taxed less, and not be guilty of fraud. On the other hand, if a taxpayer at assessment time converts taxable property into non-taxable property for the purpose of avoiding taxation, without intending a permanent change, and shortly after the time for assessment has passed, reconverts the property to its

original form, it is a discreditable evasion of the taxing laws, a fraud, and will not be sustained."

12. From the above, an assessee can choose either one of the ways which law permits, but cannot avoid tax which is assessable to tax. Only because, it was not assessed during the relevant year, it will not be the income not assessable to tax. The assessment can be revised within the period of limitation prescribed by law or the assessee can also voluntarily pay the tax on the escaped or omitted to be disclosed. But the income, which is assessable to tax, which was not assessed in the relevant year, but, admitted by the assessee on a later date, cannot be said not assessable and it shall be refunded. When speaking on tax avoidance, the Hon'ble Supreme Court in **M/s.McDowell and Company Limited Vs. Commercial Tax Officer [(1985) 3 SCC 230]** held as under:-

"17. We think that time has come for us to depart from the Westminster principle as emphatically as the British Courts have done and to dissociate ourselves from the observations of Shah, J. and similar observations made elsewhere. The evil consequences of tax avoidance are manifold. First there is substantial loss of much needed public revenue, particularly in a welfare state like ours. Next there is the serious disturbance caused to the economy of the country by the piling up of mountains of blackmoney, directly causing inflation. Then there is "the large hidden loss" to the community (as pointed out by Master Sheatcraft in 18 Modern Law Review 209) by some of the best brains in the country being involved in the perpetual war waged between the tax-avoider and his expert team of advisers, lawyers and accountants on one side and the tax-gatherer and his perhaps not so skilful, advisers on the other side. Then again there is the 'sense of injustice and inequality which tax avoidance arouses in the breasts of those who are unwilling or unable to profit by it'. Last but not the least is the ethics (to be precise, the lack of it) of transferring the burden of tax liability to the shoulders of the guideless good citizens from those of the 'artful dodgers'. It may, indeed, be difficult for lesser mortals to attain the state of mind of Mr. Justice Holmes, who said, "Taxes are what we pay for civilized society. I like to pay taxes. With them I buy civilization." But, surely, it is high time for the judiciary in India too to part its ways from the principle of Westminster and the alluring logic of tax avoidance. We now live in a welfare state whose financial needs, if backed by the law, have to be respected and met. We must recognise that there is behind taxation laws as much moral sanction as behind any other welfare legislation and it is a pretence to say that avoidance of taxation is not

and that It stands on no less moral plane than



honest payment of taxation. In our view, the proper way to construe a taking statute, while considering a device to avoid tax, is not to ask whether the provisions should be construed literally, or liberally, nor whether the transaction is not unreal and not prohibited by the statute, but whether the transaction is a device to avoid tax, and whether the transaction is such that the judicial process may accord its approval to it. A hint of this approach is to be found in the judgment of Desai, J. in *Wood Polymer Ltd. v. Bengal Hotels Limited*(1) where the learned judge refused to accord sanction to the amalgamation of companies as it would lead to avoidance of tax.

18. It is neither fair nor desirable to expect the legislature to intervene and take care of every device and scheme to avoid taxation. It is upto the Court to take stock to determine the nature of the new and sophisticated legal devices to avoid tax and consider whether the situation created by the devices could be related to the existing legislation with the aid of 'emerging' techniques of interpretation as was done in *Ramsay, Burma Oil and Dawson*, to expose the devices for what they really are and to refuse to give judicial benediction."

13. The Hon'ble Supreme Court in ***Commissioner of Income Tax, Bhopal Vs. Shelly Products and Another [(2003) 5 SCC 461]***, while dealing with a similar claim for refund of tax paid on admitted income, has observed as under:-

19. It further held that when the assessee files his return under section 139 and pays tax under section 140A by way of self- assessment claiming allowance of the advance tax or tax deducted at source in the amount of tax payable according to him, there is clear admission of the liability that has arisen under the Act to pay the tax on the total income as is computed by the assessee and duly quantified in the return. The procedure of assessment by the Income-tax Officer is essentially to check the computation of total income done by the assessee. Therefore the acceptance of the proposition canvassed by the assessee would produce a startling result where though, according to the assessee, he is liable to pay the tax as per the return filed by him and has in fact paid the tax in accordance with the provisions of section 140A of the Act and the Assessing Officer did not find it necessary to assess the total income since he may have accepted the return on expiry of the period during which the regular assessment is required to be made, the entire tax amount, admittedly payable under the Act would be required to be refunded. The scheme of the Act clearly indicates that the



liability to pay income tax chargeable under section 4(1) of the Act does not depend upon the assessment being made by the Income-tax Officer but depends on the enactment by any Central Act prescribing rate or rates for any assessment year. Thus, as soon as the rates are prescribed by the appropriate legislation, the liability to pay tax arises on the total income which is to be computed by the assessee in accordance with the provisions of the Act. By the process of self-assessment, the assessee is required to pay tax on the basis of his return and such tax is treated as assessed tax. Therefore, until it is disturbed by any further regular assessment, it remains as tax levied and collected in accordance with law. Having considered all aspects of the matter the Full Bench concluded :-

"We are, therefore, of the view that, on failure of a regular assessment being made within the time prescribed or in the event of annulment of the assessment order pursuant to which any further demand is required to be made under section 156, no consequence of refund of the entire tax collected according to the total income shown in the returns filed by the assessee can ensue and such tax which is collected on the basis of the return filed by the assessee remains a valid and legal recovery in accordance with the provisions of the said Act and there is no question of any violation of Article 265 of the Constitution of India in respect of the tax so recovered on the basis of the total income shown by the assessee in his return."

23. A learned Judge of the Kerala High Court in *E. Philip Joseph vs. Income-Tax Officer and another*: [1998] 234 ITR 846 followed the Full Bench of the Gujarat High Court. In that case there was no dispute as to the refund of tax which was levied on the income added by the Income-tax Officer at the time of regular assessment. The dispute was only with regard to the refund of tax on the income returned as per the self-assessment. It also appears from the report that the assessment framed by the Assessing Officer was set aside in appeal by the Commissioner of Income-tax who set aside the additions made by the Income-tax Officer and thereafter no fresh assessment was made pursuant to the appellate order. The assessee made a representation before the Commissioner whereafter the Income-tax Officer passed an order on the basis of the directions issued by the Commissioner of Income-tax. As against the said order the assessee filed a revision petition before the Commissioner and the Commissioner finally passed an order under section 264 of the Act which was impugned by the assessee before the



High Court. The learned Judge held that the setting aside of the regular assessment did not mean that the self-assessment made under section 140A had been set aside. Even if the regular assessment is declared to be void, it has no effect on the self-assessment made under section 140A. The direction to refund the tax paid on regular assessment does not mean that the tax paid along with the return under section 140A shall be refunded, because the payment of tax under self-assessment is on the admitted income returned by the assessee. When tax has been paid on the admitted income, even if the income added by the Income-tax Officer by way of addition in the regular assessment has been set aside in appeal or revision, the assessee has no legal right to claim refund of the tax so paid because what has been set aside is not the self-assessment but the regular assessment."

14. In the instant case also, the assessee paid the tax which is admittedly payable. Even the assessment order is set aside, it will not have any impact on the self assessment made by the assessee. The Income Tax Appellate Tribunal has considered the addition of income under Section 45(5)(b) of the Act as incorrect and nullified it. But, the assessment order on the admitted income was not nullified. Only because, there is an observation that the relevant year of assessment is 1993-1994 in view of Section 53-A of Transfer of Property Act, it will not confer any legal right on the assessee to claim refund. Admittedly, the income is assessable to tax and it was not assessed due to the statement made by the assessee that the transfer was not complete in terms of the sale agreement. The assessee cannot blow hot and cold or approbate and reprobate that what is not paid on due date cannot be assessed at all. It is true to state that there is no estoppel against law. In the judgment in **Sail DSP Vr Employees Association Vs. Union Of India [(2003) 128 Taxman 704 (Cal)]** referring to **CIT Vs. Bhaskar mitter [(1994) 73 Taxman 437 (Cal)]**, it has been held as under:-

"17. The question of estoppel because of option exercised with eyes open to the subsequent modification cannot be sustained. What is not otherwise taxable cannot become taxable because of admission of the assessee. Nor there can be any waiver of the right otherwise admissible to the assessee in law. The chargeability is not dependent on the admission of or waiver by the assessee. Chargeability is dependent on the charging section, which needs to be strictly construed. Referring to the decision in **CIT v. Bhaskar Mitter (1994) 73 Taxman 437 (Cal)** at p. 442 (paragraph 8), we had occasion to so hold in the decision in **Maynak Poddar (HUF) v. WTO (IT Appeal No. 84 of 1998, dated 24-2-2003)**."

15. The chargeability is dependent on the charging section. It is not in dispute that the income of the petitioner is chargeable to tax. In other words, the assessment authority has not assessed

the income which is not assessable to tax. Hence, the claim for refund of tax paid on admitted income is not sustainable.

16. Further, as contended by the learned counsel for the respondent, the revised order of assessment pursuant to the annulment of addition of sale consideration by the purchaser dated 25.02.2011 has not been challenged. The assessment as such has become final. What is challenged in the present Writ Petition is the rejection of request for rectification of the assessment. When the assessment order, which accepts the tax liability as proposed by the assessee, is intact, the consequential order refusing to rectify the defects in filing the returns on wrong advice cannot be sustained. As mandated by law, the assessee filed a self assessment and paid the tax on income assessable to tax along with interest for delayed payment, which is in conformity with the legal provision of Income Tax Act, 1961. If at all, the petitioner is aggrieved, she should have filed an appeal against the assessment order dated 25.02.2011. Apart from this, the order impugned has been passed in terms of the Office Memorandum issued in cases of claim for refund and following the ratio laid down by the Hon'ble Supreme Court in **Shelly Products** case cited *supra*.

17. In such circumstances, this Court is of the opinion that tax avoidance of the income chargeable to tax is not permissible under law and the above case is squarely covered by the judgment of Supreme Court in **Shelly Products** case. Therefore, the prayer sought for by the petitioner cannot be granted.

In fine, the Writ Petition is dismissed. No costs.

Sd/-

Assistant Registrar (CS-I)

// True Copy //

/ /2020

Sub Assistant Registrar(CS)

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To

The Assistant Commissioner of Income Tax,
Circle III, Trichy.

+1 CC to Mr.N. DILIPKUMAR, Advocate (SR-21283[F] dated 05/11/2020)

Order Made In
W.P. (MD) No.5542 of 2012
03.11.2020

VB (10.11.2020) 9P 3C

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