

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATE: 02.03.2021

CORAM:

THE HON'BLE MR.JUSTICE M.DURAI SWAMY
AND
THE HON'BLE MRS.JUSTICE T.V.THAMILSELVI

T.C.A.NO.873 OF 2013

The Commissioner of Income Tax,
Chennai.

... Appellant

v.

M/s.True Value Homes (India) Pvt. Ltd
TVH Triveni, 21-CV Raman Road,
Alwarpet, Chennai - 600 018.

... Respondent

Appeal preferred under Section 260A of the Income Tax Act, 1961, against the order of the Income Tax Appellate Tribunal, Madras, "D" Bench, dated 18.03.2013 in I.T.A.No.1093/Mds/2011 for the Assessment Year 2008-09

Against the Order of the Commissioner of Income Tax (Appeals)-II, 121, M.G.Road, Chennai-34 made in ITA.No.799/10-11/A III, dated 25.03.2011 for the Assessment Year 2008-09.

Against the Order of the Assistant Commissioner of Income Tax Company Circle - III (2), Chennai-34 made in PAN.No.AAACT7955Q order dated 31.12.2010 for the Assessment year 2008-09.

For Appellant : Mr.M.Swaminathan
Senior Standing Counsel
and Mrs.V.Pushpa
For Respondent : Mr.R.Sivaraman

JUDGMENT

(Judgment was delivered by M. DURAI SWAMY, J.)

Challenging the order passed in I.T.A.No.1093/Mds/2011 in respect of the Assessment Year 2008-09 on the file of the Income Tax Appellate Tribunal, Chennai, 'D' Bench (for brevity, the Tribunal), the Revenue has filed the above appeal.

2.1 The assessee is a builder and flat promoter. During the year, the assessee had executed projects at MRC apart from ongoing projects in various places. In addition, the assessee had also earned profit on sale of flat and land. The other income includes profit on sale of interior income from wind energy generation and rental income. The assessee filed its return of income for the assessment year 2008-09 admitting total income of Rs.53,10,42,860/-. The case was selected for scrutiny and notice under section 143(2) and 115WE(2), dated 21.08.2009 was served on the assessee. Thereafter, a notice under section 142(1) calling for details was served on the assessee. Thereafter, after obtaining the information, the assessment was finalised.

2.2 The item of dispute was disallowance under section 36(1)(ii) and disallowance of deduction under section 801B(10). During the year, major shareholding in respect of the assessee was held by N.Ravichandran, to an extent of 95% and acted as Chairman and Managing Director and the remuneration was paid at Rs.7,47,59,772/-. The breakup of the same was Director's remuneration amounting to Rs.2,40,00,000/- and the commission amounting to Rs.4,83,59,772/- and perquisite and benefit amounting to Rs.24 lakhs was paid.

2.3 The Assessing Officer called for explanation as to why not the commission to the Director, shareholders be disallowed under section 36(1)(2). The assessee submitted its reply stating that the Chairman and Managing Director devoted full time in getting buyers also in formulating strategic marketing decision. The Assessing Officer did not accept the same and held TPH was a brand in itself catering to premium segment and did not require any marketing efforts on the part of the assessee and assessee got number of marketing professional on its roles ranging from Assistant General Manager Marketing, Senior Manager, Manager, Chief Manager (Marketing). Consequently, the payment of commission by the assessee is covered under section 36(1)(ii) and therefore, an addition of Rs.4,83,59,772/- was added to the total income.

2.4 As regards, the disallowance of deduction under section 801B(10), the assessee had executed the project name TVH Rozalia and claimed deduction under section 801B(10). The assessee has stated vide letter dated 26.11.2010 that the conditions stipulated were satisfied. As regards approval of the local authority, the assessee has stated that the lands were approved by the CMDA vide permit dated 29.05.2006 and the Assessing Officer held that the approval was obtained in the name of the Director Mrs. Kalaiarasi, who was not a developer as the approval was in the name of the developer.

2.5 Aggrieved over the order passed by the Assessing Officer, the assessee filed an appeal before the Commissioner of Income Tax (Appeals), who deleted the addition made under section 36(1)(ii) holding that the said deduction could be made applicable only to employee who receives commission and not a Director and there was no bar for the Director of the company being paid commission. As regards 801B(10) deduction, the Commissioner of Income Tax (Appeals), held that the assessee was entitled to the benefit of the same as developer of the same.

2.6 Aggrieved over the order passed by the Commissioner of Income Tax (Appeals), the Revenue has filed an appeal before the Income Tax Appellate Tribunal, and the Tribunal also confirmed the order passed by the Commissioner of Income Tax (Appeals). Challenging the order passed by the Income Tax Appellate Tribunal, the Revenue has filed the above appeal.

3. The appeal was admitted on the following substantial questions of law:

- " (i) Whether on the facts and circumstances of the case, the Tribunal was right in upholding the order of CIT(A) in deleting the disallowance made by the AO under section 36(1)(ii) of the Income Tax Act?
- (ii) Whether on the facts and circumstances of the case, the Tribunal was right in holding that the claim of deduction made by the assessee under section 801B(10) is to be allowed?"

4. When the appeal is taken up for hearing, Mr. M. Swaminathan, learned Senior Standing Counsel appearing for the appellant fairly submitted that the issues involved in the present appeal are covered by the decision of this Court. The learned Senior Standing Counsel further submitted that so far as the 1st question of law is concerned, the same is covered by the decision of the Judgment of the Division Bench of the Delhi High Court reported in (2012) 20 Taxmann. com 647 (AMD Metplast Pvt Ltd v. Deputy Commissioner of Income Tax] wherein the Delhi High Court held as follows:-

" ... 10. We fail to understand how the aforesaid observations assist and help the Revenue in the factual matrix of the present case. Ashok Gupta is the Managing Director and in terms of the Board resolution is entitled to receive commission for services rendered to the company. It is a term of employment on the basis

of which he had rendered service. Accordingly, he was entitled to the said amount. Commission was treated as a part and parcel of salary and TDS has been deducted. Ashok Gupta was liable to pay tax on both the salary component and the commission. Payment of dividend is made in terms of the Companies Act, 1956. Dividend has to be paid to all shareholders equally. This position cannot be disputed by the Revenue. Dividend is a return on investment and not salary or part thereof. Herein the consideration in the form of commission which was paid to Ashok Gupta was for services rendered by him as per terms of appointment as a Managing Director. In view of the aforesaid position, we answer the question of law in negative and in favour of the assessee and against the Revenue. The appeal is accordingly allowed. No costs.

5. So far as the 2nd question of law is concerned, the same is covered by the decision of the Hon'ble Division Bench of this court reported in 2013(255) CTR 156 [Commissioner of Income Tax v. Sanghvi and Doshi Enterprise] wherein the Division Bench of this Court held as follows:-

"... 32 This takes us to the second question as regards the completion certificate. As already pointed out in the preceding paragraphs, the assessee had evidently completed the construction as early as 05.03.2006, a fact which is not disputed by the Revenue. It is also an admitted fact that the approval was granted for construction, both by the Chennai Metropolitan Development Authority and the local authority, namely, Chennai Corporation. The letter of the Chennai Metropolitan Development Authority according sanction to the project as early as 23.9.2003 clearly points out that the sanction was also subject to the approval by the Corporation. Thus, with the planning details being subjected to the approval by the Corporation as the competent local authority and it having certified as to the completion as early as 28.12.2007, we are satisfied that the completion being on or before 31.3.2008, the reliance placed on Explanation (2) to reject the assessee's case could not be sustained. In any event, given the fact that the approval, which is an administrative process, is purely at the hands of the Statutory Authority concerned, over which, the assessee could not have any control, the Explanation cannot, in any manner, have a negative effect on a factual aspect of the matter, namely, completion of the construction. Thus, in a case like this, where, the local authority,

being the Corporation, had already certified about the completion of the project as per the approved plan, the fact that one of the Authorities, namely, Chennai Metropolitan Development Authority had issued a letter only on 13.6.2008, per se, cannot negative the assessee's claim for deduction."

6. Further, the Commissioner of Income Tax (Appeals) in its order has observed that the return filed by Shri.Ravichandran that he has offered the entire commission for taxation and paid tax at the maximum marginal rate without claiming any deduction. Therefore, motive of tax avoidance is also absent.

7. On a careful consideration of the materials available on record and also the judgments cited supra, it is clear that both the questions of law are covered by the judgments of the Delhi High Court and this Court. Following the same, we are of the view that both the questions of law have to be decided against the revenue. Accordingly, the questions of law are decided against the Revenue and in favour of the assessee. Hence, the Tax Case Appeal is liable to be dismissed. Accordingly, the same is dismissed. No costs.

Sd/-
Assistant Registrar(CCC)

//True Copy//

Sub Assistant Registrar

Rj

To

1. The Income Tax Appellate Tribunal,
Chennai, 'D' Bench
2. The Commissioner of Income Tax (Appeals)-III,
121, M.G.Road, Chennai-34.
3. The Assistant Commissioner of Income Tax,
Company Circle - III (2), Chennai-34.

+1cc to Mr.M.Swaminathan, Advocate, S.R.No.13493

T.C.A.No.873 of 2013

SR-II(CO)
CS/31/03/2021