IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 23.03.2021

CORAM :

The Honourable Mr.Justice T.S.SIVAGNANAM
and
The Honourable Ms.Justice R.N.MANJULA

Tax Case Appeal No.181 of 2020

The Commissioner of Income Tax,
Chennai. ...Appellant

Vs

Mrs.Pinky Devi ...Respondent

PRAYER: Appeal under Section 260A of the Income Tax Act, 1961 against the order dated 06.12.2019 made in ITA.No.1803/Chny/2018 on the file of the Income Tax Appellate Tribunal, Madras 'A' Bench, Chennai for the assessment year 2010-11.

Appeal against the order dated 21.03.2018 made in ITA.No.83/CIT(A)-5/2017-18 on the file of the Commissioner of Income Tax(Appeals)-5, Chennai-34 for the Assessment Year 2010-11 and as Appeal against the order dated 31.10.2017 made in PAN.No.ALXPP7284K on the file of the Income Tax Officer, Non Corporate Ward 5(5), Chennai, for the Assessment Year 2010-11.

For Appellant : Mr.T.Ravikumar, SSC

For Respondent: No Appearance

JUDGMENT
(Delivered by T.S.Sivagnanam,J)

This appeal has been filed under Section 260A of the Income Tax Act, 1961 ('the Act' for brevity) challenging the order dated 06.12.2019 made in ITA.No.1803/Chny/2018 on the file of the Income Tax Appellate Tribunal, Madras 'A' Bench, Chennai ('the Tribunal' for brevity) for the assessment year 2010-11.

2. The appeal was admitted on 23.07.2020 on the following substantial questions of law:

> "(i) Whether on the facts and in the circumstances of the case, the Tribunal was right in setting aside the order passed by the Assessing Officer for re-examination, especially when the Assessing Officer had

duly examined the matter in great depth while framing the assessment order?

(ii) Whether on the facts and in the circumstances of the case, the Tribunal was right in remitting the issue back to the file of the Assessing Officer by quoting the decision in the case of Kanhaiyalal and Sons (HUF) in ITA.No. 1849/Chny/2014 wherein the onus has been shifted to the revenue with a direction that the Assessing Officer is to bring on record the role of the Assessee in promoting the Company and the relation of the Assessee if any with that of the promoters and role of inflating of prices etc while exercise had already been done by the AO?

3. Is not the finding of the Tribunal perverse especially when the decision of the Tribunal is contrary to the time tested Principal that the person who asserts a fact has to discharge the initial burden cast upon him to show that the said facts are true and only thereafter the burden would shift to the department?"

3. We have heard Mr.T.Ravikumar, learned Senior Standing Counsel appearing for the appellant-Revenue. Though notice was served on the respondent and the name printed in the cause, none appeared on their behalf.

4. The Tribunal followed its earlier decision in the case of Kanhaiyalal & Sons (HUF) Vs. ITO in ITA.No.1849/Chny/2018 and remanded the matter back to the file of the Assessing Officer for reconsideration.

5. In several other matters, identical orders were passed by the Tribunal remanding the matter back to the Assessing Officer. This Court has dealt with an identical issue in the case of Commissioner of Income Tax vs Manish D.Jain (HUF) [(2020) 122 taxmann.com 180 (Madras)]. In the said decision, this Court faulted the Tribunal for remanding the matter back by assigning the following reasons:

"24. Bearing the principles laid down in the decision of the Hon'ble Supreme Court in the case of NRA Iron & Steel Private Ltd., in mind, if we examine the order passed by the Assessing Officer, we find that a detailed enquiry had been conducted by the Assessing Officer after affording an opportunity to the assessee. The assessee availed the opportunity through written submissions. The assessee was represented by an authorized representative and thereafter a finding had been rendered. The said finding was tested for its correctness by the CIT(A), who approved the same by order dated 07.8.2018.

25. We refer to the following factual findings rendered by the CIT(A) while dismissing the appeal filed by the assessee :

"2.1. ....In response to notices, the AR of the assessee Shri Omprakash Jain, B.Com, FCA of Om Jain & Associates, Chartered Accountants appeared and filed the details of purchase of 450 shares of M/s.Dhanlabh Merchandise Limited, later it was merged with M/s.Bakra Pratisthan Limited and 450 shares converted into 4500 shares. In this connection, the AR furnished the copy of sale bill dated 15.1.2010 of M/s.Excellent Barter Private Limited of Shaym Nagar WB 743127 wherein it is noticed that the assessee has purchased 450 shares of Dhanlabh Merchandise Limited @ Rs.200 each per share for a consideration of Rs.90,000/-. But the bill does not contain any distinctive numbers and it was stated 'as per Demat form'. The AR of the assessee also furnished the copy of transaction report from Motilal Oswal Securities as documentary evidence for purchase of these shares and later converted into M/s.Bakra Pratisthan Limited on 28.12.2011.

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2.2........On the perusal of the same, it is noticed that the closing balance as on 02.3.2010 was Rs.5,607/-. On 03.3.2010, there was a credit entry of Rs.90,000/- and a debit entry with narration 'manual chg' Rs.90,000/-. As per the narration of the bankers, it is manual cheque only and the same was passed in clearing on the same day by Calcutta base company. It is not at all possible.

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2.3. As it was held by the assessee the shares of M/s.Dhanlabh Merchandise Limited was purchased from M/s.Excellent Barter Pvt. Ltd. Of Shaym Nagar WB 743127, a communication dated 28.9.2017 was sent to M/s.Excellent Batter Private Limited calling for the following details under Section 133(6) of the I.T. Act 1961. By the examination of the details and the same was returned unserved by the postal authorities with remarks 'not known'.

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Besides the above, the AR of the assessee has not furnished any documentary evidences with respect to the sale of shares of M/s.Bakra Pratisthan Limited. Instead, he furnished the bank account copy wherein on 03.1.2012, an amount of Rs.9,50,714/- was credited in the bank with description 'RTGS-INWFIX- FIT SECURITIES'. Considering the above
fact, it is concluded as under :

2.4. The purchase of 450 shares of M/s.Dhanlabh Merchandise Limited is itself a sham transaction for the following reasons:

1. Based on the details filed by the AR of the assessee and the address was provided the assessee the communication sent by this office to M/s.Excellent Batters Private Limited.

2. The postal remarks is 'not known' only. The postal authorities did not mention that the person left or something else. The word 'not known' means that the address itself bogus or incorrect one.

3. Accordingly, it is established that there is no such person in that address having name M/s.Excellent Batters Private Limited.

4. It is onus on the part of the assessee to prove the genuineness of the transaction.

5. It is also noticed that the documentary evidence filed by the assessee towards payment made for purchase of shares also not related to this transaction.

6. In the absence of the distinctive nos., in the sale bill dated 25.1.2010 of M/s.Excellent Batters Pvt. Ltd., and hence, it is not known that to whom the shares were originally allotted and how the same was subsequently transferred to the assessee for that there is no documentary evidence produced. The assessee HUF not furnished the copy of name transfer application also.

7. It is also noticed from the AR of the assessee's submission dated 15.11.2017 that M/s.Excellent Batters P. Ltd., is a shareholder of M/s.Dhanlabh Merchandise Ltd., but there is no documentary evidence was filed by him.

8. As the assessee HUF itself has stated that the HUF is doing commodities trading, why off market transaction for purchase of shares not reported to BSE. Considering the above fact findings, it is established that the purchase of 450 shares of M/s.Dhanlabh Merchandise Limited

from M/s. Excellent Barter Private Limited by the assessee is itself a sham transaction. Accordingly, the documentary evidence furnished by the assessee towards purchase of shares of 4500 M/s.Bakra Pratisthan Limited is not a genuine one and hence, the claim of exemption under Section 10(38) towards selling of the same is not entertained.

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7.11. It can be seen from the client statement of Shri Ashok Kumar Kayan that not only the assessee but the following members of the HUF family members have also invested in the said impugned shares :

SNo	Name	PAN	Amount
01	Karuna A Jain	AGTPJ5140K	25,46,855
02	Abhishek Jain	AEUPJ3242F	15,93,300
03	Abhishek M Jain HUF	AAJHA1645J	15,86,250
04	Amit Kumar	AEEPA9942F	15,86,250
05	Amit Kumar I Jain HUF	AAJHA1641N	15,86,250
06	Hitesh M Jain HUF	AADHH3539N	10,57,500
07	Mamta M Jain	AFJPM4958B	9,52,290
08	Manish D Jain HUF (assessee)	AAJHM6100N	15,86,250
09	Nitin I Jain	AEPPN8578R	15,86,250
10	Nitu Amit Jain	AEZPJ1421K	22,21,695
11	Rajesh D Jain	AEOPR8702G	15,93,300
12	Shilpa M Jain	AGZPJ9692C	15,93,300
		Total	1,94,89,490

From the above table, it is established that the entire family involved in this operation to convert their black money into white. It is a sham transaction only.

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9. Considering the above factual position as also the legal position, it is held that the assessee has entered into an engineered transaction to generate artificial long term capital gains. As the explanation furnished by the assessee regarding the credits of Rs.15,86,250/- in its books is found to be unsatisfactory, the same are hereby held as

'unexplained cash credits' in the books of the assessee and accordingly added to the total income of the assessee in accordance with the provisions of Section 68 of the IT Act, 1961 and assessed under the head 'income from other sources' Penalty proceedings under Section 271 (1)(c) read with Explanation 1 thereto are separately initiated for furnishing the inaccurate particulars of income with respect to the claim of capital gain made in the light of the findings made in the preceding paragraphs.

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7.3.......However, in the present appeal, the appellant purchased the shares of M/s.Bakra Pratisthan Limited in off market. During the course of the hearing on 24.7.2018, the AR admitted that the assessee purchased the shares of M/s.Dhanlab Merchandise Limited in off market.

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7.4. These shares were purchased through off market and not through Stock Exchange.

The notice under Section 133(6) dated 28.9.2017 sent by the Assessing Officer to M/s.Excellent Barter Private Limited from which the assessee had purchased the shares of M/s.Dhanlab Merchandise Limited was returned unserved with remark 'not known'.

Moreover, the assessee did not bring any other material on record to establish the genuineness of the purchase of shares.

M/s.Bakra Pratisthan Limited did not pay dividend or did not issue bonus shares during the period of holding of these shares by the assessee corresponding to the increase in the price of the share of M/s.Bakra Pratisthan Limited. During this period, there has been no corporate announcement by M/s.Bakra Pratisthan Limited which suggests that the company is undertaking any substantial development activity.

The above facts were not disputed by the appellant.

These facts clearly establish that the share prices of M/s.Bakra Pratisthan Limited were artificially hiked.

.....

7.6. In the present case also, the shares were purchased through off market and not through Stock Exchange and selling rates were artificially hiked later on."

26. The above findings will clearly show that not only the Assessing Officer, but also the CIT (A) examined the modus operandi of the assessee and held that the shares were purchased through off market and not through Stock Exchange and that the selling rates were artificially hiked later on. The above findings have not been set aside by the Tribunal and there is no reason for the Tribunal to remand the matter to the Assessing Officer for a fresh consideration.

27. As pointed out in the decision of this Court in the case of Cholamandalam MS General Insurance Co., we find in the instant case that there was no material, which necessitated the remand of the case to the Assessing Officer and it is a clear case where the Tribunal had failed to exercise its jurisdiction in the manner known to law. The Tribunal, being a last fact finding Authority, is under the legal obligation to record a correct finding of fact. It has been held in the cases of

(i) M.R.M.Periyannan Chettiar Vs. CIT [reported in (1960) 39 ITR 159 (Madras)]

(ii) V.Ramaswamy Iyengar Vs. CIT [reported in (1960) 40 ITR 377 (Madras)]

(iii) Hindustan Sanitary Ware and Industries Ltd. Vs. CIT [reported in (1978) 114 ITR 85 (Calcutta)]

(iv) CIT Vs. Ishwardass [reported in (1986) 158 ITR 168 (Delhi)] and

(v) CIT Vs. Harikishan Jethalal Patel [reported in (1987) 168 ITR 472 (Gujarat)]

that the power to remand the case should be exercised on judicial principles.

28. Further, in the decisions in the cases of

(i) United Commercial Bank Vs. CIT [reported in (1982) 137 ITR 434 (Calcutta)]

(ii) Darjeeling Dooars Plantations Vs. CIT [reported in (1988) 174 ITR 37 (Calcutta)] and

(iii) Siemens India Ltd. Vs. CIT [reported in (1997) 226 ITR 801 (Bombay)],

it was held that where all the evidence had been produced and the CIT(A), after full investigation of the evidence and examination of the accounts, had given a definite finding on the question in issue, the Tribunal's order of remand was held to be invalid.

29. Further, in the recent decision of the Hon'ble Division Bench of this Court in the case of Tharakumari Vs. ITO [TCA.No.128 of 2019 dated 11.2.2019], the appeal filed by the assessee in a case relating to penny stock was dismissed after noting the factual findings rendered by the Assessing Officer, the CIT(A) and the Tribunal. Thus, for all the above reasons, we hold that the order passed by the Tribunal calls for interference.

30. In the result, the above tax case appeal is allowed, the impugned order passed by the Tribunal is set aside and the substantial questions of law framed are answered in favour of the Revenue and against the assessee. Consequently, the order passed by the CIT(A) stands restored."

6. Since the Tribunal had followed the earlier decision, which has been set aside in the above mentioned decision, the same has to be applied in this case as well.

7. Thus, the Tax Case Appeal is allowed and the impugned order is set aside. Consequently, the substantial questions of law are answered in favour of the Revenue and against the assessee. No costs.

Sd/-
Assistant Registrar

//True Copy//

Sub Assistant Registrar

hvk

To
1. The Income Tax Appellate Tribunal,
Madras 'A' Bench, Chennai.

2. The Commissioner of Income Tax,
(Appeals)-5, Chennai-34.

3. The Income Tax Officer,
Non Corporate Ward 5(5), Chennai.

+1cc to Mr.T.Ravikumar, Advocate, S.R.No.18740

LN(CO)
KM(23/04/2021)